

*United States Court of Appeals  
for the Second Circuit*



**APPENDIX**



**75-7600**

**United States Court of Appeals  
For the Second Circuit**

COLUMBIA BROADCASTING SYSTEM, INC.,

*Plaintiff-Appellant,*

*against*

AMERICAN SOCIETY OF COMPOSERS,  
AUTHORS AND PUBLISHERS, *et al.*,

*Defendants-Appellees.*

**On Appeal from the United States District Court  
for the Southern District of New York**

**JOINT APPENDIX**

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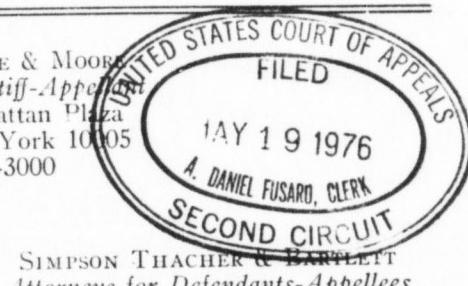
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ASCAP Exhibit No. 223—Contract dated November 5, 1965, be- tween 3M and Milene Music, Inc. ....	E1517
ASCAP Exhibit No. 290—Agreement dated as of 7/1/67 between CLGA and Producers ....	E1529
ASCAP Exhibit No. 326—Gitter Affidavit dated 6/17/74 in this action ....	E1563
BMI Exhibit No. 114—BMI Consent Decree dated December 29, 1966 ....	E1568
BMI Exhibit No. 166—Letter from Edward Cramer to CBS dated October 29, 1969 ....	E1579

2 Q Isn't it your understanding, Mr. Chiantia, that  
3 a substantial number of music publishing companies which  
4 are affiliated with publishing groups are companies in  
5 which writers of music hold some proprietary interest?

6 A My difficulty is with the word substantial.

7 MR. TOPKIS: May I hear the question?

8 THE COURT: Read the question back, please.

9 (Record read.)

10 MR. TOPKIS: That is so vague that I don't  
11 think a yes or no would give you an answer.

12 THE COURT: Why don't you start by asking  
13 whether there are some which have company affiliates  
14 which are partly owned by the writers.

15 A Yes, and <sup>Clippie</sup> Kappel was an outstanding example of  
16 that.

17 THE COURT: I don't know whether you want to  
18 try to put it in terms of percentage of constituent  
19 members of goods of NMPA or what else you want to do.

20 MR. HRUSKA: There is really only one point I  
21 want to make on this and I will put it in the form of a  
22 question.

23 Q Isn't this a method by which writers split with  
24 publishers the publisher part of ASCAP distributions?

25 A Well, every writer has the opportunity to



1 jbs

Chiantia-cross

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2 become a publisher and, indeed, there are some writers  
3 who are publishers as well.

4 Irving Berlin is a very fine example of that.  
5 To the extent that they are big enough to command that  
6 kind of a relationship, I see nothing wrong with it.

7 Q I didn't suggest anything was wrong with it.

8 THE COURT: The question is whether when it  
9 occurs, that is, in the case of companies writer owned,  
10 it has the result or is used for the purpose of seeing to  
11 it that writers split publisher's ASCAP fees.

12 A No. I think it goes beyond that. your Honor.  
13 I think it goes --

14 THE COURT: Maybe so but does it go that far?

15 A At least that far, yes.

16 Q This is done with writers who have perhaps more  
17 than normal bargaining power for writers, bargaining  
18 power vis-a-vis publishers?

19 A Yes.

20 MR. HRUSKA: Your Honor, I would like to offer  
21 in evidence through Mr. Chiantia the MCA music publishing  
22 financial statements, which were supplied to us. I am  
23 raising this now instead of going into the usual motions  
24 on this because this is a confidential document and I  
25 don't know that we have really established any ground

1 jbs

Chiantia-cross

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23 raising this now instead of going into the usual motions  
24 on this because this is a confidential document and I  
25 don't know that we have really established any ground

rules in this trial of how we would deal with confidential documents.

THE COURT: Assuming that it is admissible, and I would like to understand what the purpose of the offer is, I suppose the way to handle confidential documents would be for one copy to be made available -- I think there are two different categories.

First of all, there are the documents of the parties which are confidential, which I think perfectly clearly each of them can have so long as the counsel in charge or either side holds himself responsible both to his opponent and to the Court to keep the material confidential. Then, there is the question of material of third parties and my instinctive reaction there would be ordinarily to seal such documents and make them available on reasonable bases to counsel for whatever use necessary but I would like to preserve the confidence of the third parties as much as possible.

MR. HRUSKA: Your Honor, there is one point that I would be trying to bring out through these functions. One main point, and I think the only point we really have to allude to in the testimony is the amount of distributions that MCA receives from ASCAP in respect of CTN uses.

Perhaps I can ask Mr. Chiantia whether he

regards that as a confidential figure, because if that is not regarded as a confidential figure, then it removes the problem.

THE WITNESS: I am willing to waive the confidentiality.

MR. HRUSKA: I didn't hear that.

THE COURT: He says he is willing to waive the confidentiality, if it is confidential.

Are there any reporters in the room? However impressive this case is apparently the Press is not terribly excited about it.

MR. HRUSKA: I won't try to come up with a precise figure.

THE COURT: He may not carry the figure in his head. You may have to give him a copy of the document.

Q ASCAP provided us with a compilation of data which is by the way, PX 466 for identification; it has not yet been put into evidence, which sets forth for the Leeds group, as well as other publishing groups, the total distribution amount which ASCAP distributed to Leeds of the CBS credits earned by Leeds -- that is CTN credits -- and the total credits issued from Leeds.

Now, it is possible to compute the percentage of your total credits which is generated by CTN uses from

1 jbs

Chiantia-cross

2 this document. It is possible to apply those percentages  
3 to the figures on your financial statements.

4 In doing that for the five years involved, 1963  
5 through 1972, and counsel can check this, it turns out  
6 that approximately, based on this information, \$460,000  
7 was received by Leeds for this period in respect of CTN  
8 uses.

9 A 1963 to 1972?

10 Q '63 through '72.

11 A And the amount was --

12 Q \$460,000.

13 Now, is this a figure, put it on an annual basis,  
14 is the annual amount of income that Leeds receives through  
15 ASCAP in respect of a television network's use of your  
16 music the kind of figure which you pay attention to or  
17 are concerned with, use for your planning, for your  
18 thinking in running your publishing companies?

19 MR. TOPKIS: Could I have that question back  
20 and could I see the figures that Mr. Muska is using?

21 I would like to check the arithmetic.

22 THE COURT: I don't know that we have to check  
23 the arithmetic at the moment. He is entitled to ask  
24 any hypothetical question that he wants, subject to  
25 connection, or I will rule that he is at the moment.

I am not assuming that it is a proven figure but what you are asking, as I understand it, Mr. Hruska, is whether the sum of \$92,000, which is one-fifth of \$460,000 annually.

MR. HRUSKA: On the average.

THE COURT: That much I understand but I am not quite sure what you are asking about -- is such as to affect the planning of Leeds or the planning of MCA or what?

MR. HRUSKA: Let me back up, your Honor.

I think I must agree that I did not put the question well. Let me try it from this approach.

Q Is it part of your job, sir, in running your music publishing companies to know where your publishing revenues are coming from?

A Yes.

Q At least the significant source of your revenue?

A Yes.

Q And you understand that a significant source of revenue to your companies consists of ASCAP distributions in respect of television network users?

A Correct.

Q Do you have occasion over the years to make a computation as to how much you receive from ASCAP in respect

jbs

Chiantia-cross

2 of television network uses?

3 A I look at my statements, yes, and see what comes  
4 from radio, what comes from television, that's correct.

5 Q Is it a fair statement that what comes from CTJ  
6 uses would be roughly the same as what comes from NBC and  
7 ABC uses, television network?

8 A I don't know. I don't know that that is so.  
9 I don't know that it is so because I never break down the  
10 television figures.

11 I look at my television performances and I don't  
12 bother to analyze whether they come from CBS, NBC, ABC or  
13 where they come from.

14 Q You have no reason to believe that over a period  
15 of four or five years there is a great difference between  
16 the CTJ uses of your music and ABC and NBC uses?

17 A They are probably higher on ABC and NBC for the  
18 simple reason that we have many more television shows on  
19 those networks. On CBS we were recently successful with  
20 you on a program called Kojac, but up until that time it  
21 was pretty lean.

22

23

24

25

2 Q Now, you talked before about competition among  
3 music publishers and I take it, am I correct, that you  
4 engage in price competition in the licensing of  
5 mechanical rights?

6 A Yes.

7 Q And that would be pretty much -- strike that.  
8 There would certainly be price competition,  
9 would there, on specialty products?

10 A That's correct, yes.

11 THE COURT: What are specialty products?

12 THE WITNESS: I think he is referring to  
13 premium packages and packages established for special  
14 projects for special sale at low prices, is that what you  
15 are talking about?

16 Q Could you give an example of that?

17 A Of a premium?

18 Q Yes.

19 A A premium package would be one that would be  
20 prepared at the behest of let us say KLH. I don't know  
21 that anything --

22 Q I can't hear you.

23 A KLH is a manufacturer of phonographs. Let  
24 us say they wanted to demonstrate their phonograph and  
25

lzs2

Chiantia-cross

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wanted to have a sampler in connection with that which they would give away free. They would go to anybody with a custom division and ask that a custom record be made and they would pay a stipulated price for it and it would be up to CBS to get the license.

Q Is there a phrase in this description that is broadcast records?

A I think you are referring to the special packages which are advertised on television?

Q Precisely. And there, too, you get into a good deal of price competition with other publishing companies on mechanicals?

A Yes.

Q Mr. Chiantia, there was another aspect of your direct examination which had me somewhat confused.

You said, and I remember your putting it in terms of frankly, you would rather license through ASCAP and license directly. Then you mentioned the fact that that was because of convenience and policing and then you said that convenience and policing, if I understood you correctly, did not really apply to the licensing of television networks.

A No, that's not what I said.

Q Perhaps you can clear it up.

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A No, I said that I would not hesitate to enter into a direct license with a large television network because there, the facilities for policing would be much simpler than they would be, for example, if I had to police the licensing of dancehalls and cabarets and bars. That's what I said.

Q But you also said that you preferred to deal through ASCAP?

A Yes, I do.

Q For the licensing of television networks?

A Yes.

Q Can you tell me why that's so?

A Well, it's a system that has worked for me and for my company. I know it's worked for a lot of other people. And unless somebody comes up with a system which, it seems to me, is reasonable alternative, I see no reason to change. In the case of Minnesota Mining, for example, they came up with a reasonable alternative. I went into the deal.

Q We will get into that, I promise you.

A I'm sure you will.

THE COURT: Why do you regard -- or do you regard direct licensing as -- forget per use -- direct licensing as a real alternative?

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Chiantia-cross

THE WITNESS: Yes, I do, sir.

THE COURT: Have you any opinion as to why it has never occurred?

THE WITNESS: My guess would be, that the television networks, if we are talking about television networks, were perfectly satisfied all these years to act under a blanket license. If they had been dissatisfied, they certainly would have approached us with a direct license but I never have received a direct approach for a license from anyone except that completely different area.

Q You said also something on direct about the fact that you would deal directly with the television network if the network or the producer of a program made you an offer you couldn't refuse. Perhaps you can particularize that statement a little more. What would you regard to be an offer you couldn't refuse?

A Well, for example, if we are talking about a producer of a musical variety show, in rough terms, a performance on a musical variety show on any one of the networks would bring anywhere from \$400 to \$500.

Q For the publisher?

A For the publisher, that's correct.

2 Q And a like amount for the writer?

3 A And a like amount for the writer.

4 If a producer came to me and said to me, I want  
5 to use that composition and I want you to give me the per-  
6 forming rights and I'm willing to pay you \$3000,  
7 in a case like that I would go to my writer, if I had to,  
8 assuming that he's anAGAC writer -- I had many songs  
9 which-are no ACAC contracts, I would go to the writer  
10 and tell him I think this is a good opportunity for us  
11 to license directly and providing I got his permission I  
12 would go ahead and license.

13 Q You are not worrying about the bargaining  
14 power of the television networks?

15 A In what context? Are we talking now with  
16 a ceiling?

17 Q No.

18 A Or are we talking about a system in which there  
19 is complete direct license?

20 Q What you were talking about in your direct  
21 examination. Limit yourself to that.

22 Do you believe you would be at the mercy of  
23 the CBS television network if they approached you in the  
24 circumstances you have just described?

lzx6

Chiantia-cross

A You mean I'm at the mercy of the CBS network if they come and offer me \$3000 where normally we would be getting a thousand?

Q That's the question.

A I would hardly call that as being at the mercy of CBS.

Q Do you have any reason to believe you would ever be at the mercy of CBS if a producer ever called you on the telephone and asked you for a direct license?

A In what context?

Q Let's say this producer wants to play April on his program and he does so because one of the guest stars of the program has said, I like that song April, that's what I want to sing in my spot. Do you think you are at the mercy of the producer? Do you think you have unequivocal bargaining power?

A Does CBS have a blanket license?

Q No. No license. No license to April.

A No, does it have a blanket license?

Q No. No license.

A I don't understand you are talking about the per use system?

Q I am not. I am talking about what you were talking about in your direct examination.

lzx:

Chiantia-cross

A In direct examination we were talking about a direct licensing system, is that correct?

Q Yes.

A Would I be at the mercy of CBS?

Q Yes.

P Well, I would have to arrive at a fee with CBS which CBS would consider to be reasonable.

Q The producer you are talking about?

A That's right. Because there again, songs are interchangeable, even in the direct licensing world, and it may very well be that the fee I charge for April may be considerably higher than the fee that the publisher of Misty will charge. In that case CBS will leave me and go to the publisher of Misty.

Q Maybe, maybe not.

A Unless the song was absolutely indispensable. In that case, if I continue to ask for that level of price from CBS and I kept getting turned down, the message might come to me that CBS just wasn't going to pay that price and in those conditions I might come down in my price.

Q When you say CBS, you are really talking about the producer on the program?

A Fine.

2 Q So you might come down on your price?

3 A I might.

4 Q But you wouldn't feel you were at the mercy  
5 of --

6 A There are only three games in town. I  
7 have to play one of three games. If we are talking  
8 about television, there are only three games in town.  
9 If I am effectively cut out from one, I only have two more  
10 to play with.

11 Q When you say you are effectively cut out,  
12 when a company making a specialty produce record comes  
13 to you for a quotation on mechanical rights and you quote  
14 1-3/4 cents on April and the publisher of Misty quotes  
15 one and a half cents, you are effectively cut out, right?

16 A What are you talking about now? Are you  
17 talking about special projects?

18 Q That's what I defined.

19 A Yes. I am cut out.

20 Q You are cut out, aren't you, you lost in the price  
21 bid?

22 A That's right.

23 Q Now, Mr. Brettler testified on his deposition  
24 that "In unity there is strength and in disunity there is  
25 weakness. The unity of ASCAP" --

2  
3 THE COURT: I thought that was Benjamin  
Franklin.

4 Q Mr. Bretterwas theBenjamin Franklin in this  
5 industry.

6 A I thought quite honestly that came from  
7 King Leopold, L'Union Fait La Force.

8 Q This, however, does not go to King Leopold.  
9 Continuing with the quotes. "The unity of ASCAP,  
10 which is basically a legal monopoly, we have more  
11 strength in combining this negotiation, throwing all our  
12 copyrights together into a vast pool of music that makes  
13 it very attractive to a user to deal with ASCAP. We  
14 don't have to face the problem of all of us individually  
15 dealing with a user or a producer..."

16 Do you agree with that statement?

17 A If we are living in a world where we have  
18 ASCAP and BMI, yes. If we have no ASCAP and BMI and KTN  
19 is no longer taking any licenses from ASCAP or BMI, I would  
20 negotiate directly with you.

21 Q That's not my question.

22 THE COURT: There are an awful lot of state-  
23 ments in there. I don't know whether you are asking Mr.  
24 Chiantia whether he agrees with all of it or part of it.  
25 He could agree it was convenient without agreeing it was a

2 monopoly. He could agree to a lot of things.

3 Q Basically, the point made by Mr. Brettler  
4 is that you got more bargaining power, each individual  
5 publisher has more bargaining power as part of ASCAP  
6 than is possible individually. Is that a point to which  
7 you agree?

8 A I don't think that's completely true. In a  
9 case where you would need one of my songs, again getting  
10 back to Mr. Gilbert O'Sullivan. I might be able in a  
11 direct negotiation with you to get a much higher price  
12 than I get through ASCAP. So I don't particularly  
13 agree with that statement, no.

14 Q How about by and large during the course of the  
15 year, do you think you had more bargaining power dealing  
16 through ASCAP or do you think you would come out better  
17 dealing on your own?

18 A I have difficulty answering your question.  
19 Let me answer it this way. I prefer dealing with  
20 ASCAP because I know that in certain circumstances I will  
21 get less than what I could negotiate for. In other  
22 circumstances I might get more. To use an old English  
23 expression, what I lost on the swings, I get on the round-  
24 abouts. If I don't have that system any more, I am  
25 going to negotiate for the best possible price I can

2 get and in some cases I may very well get more than I  
3 can get under the ASCAP system.

4 Q How would you vote as a member of the ASCAP  
5 board on the question of whether ASCAP should get out of the  
6 business of licensing television networks?

7 MR. TOPKIS: I think that's an improper  
8 question.

9 THE COURT: May I hear the question, please?

10 (Question read)

11 THE COURT: I'll sustain the objection on the  
12 grounds it seems to me to call for the disclosure of  
13 information of a fiduciary nature but you can ask him what  
14 his personal opinion is. His personal prediction.

15 MR. TOPKIS: My objection was on the fiduciary  
16 nature of the information.

17 If his answer is on a personal view, it would  
18 have to be surrounded with all the circumstances that might  
19 prevail at the time he were thinking of casting his vote  
20 and it would be objectionable on that ground unless  
21 amplified and in that case we would be off on another one  
22 of these hypothetical never-never lands which we seem to be  
23 invading so regularly.

24 THE COURT: If it's important to ask this,  
25 do you think, it would be in the interests of MCA to do

Chiantia-cross

2 so and so or do you think it would be in the interests of  
3 ASCAP to do so and so.

4 Q Do you think, Mr. Chiantia, it would be in the  
5 better interests of MCA if ASCAP were to cease licensing  
6 television networks?

7 A No. Because MCA is a producer of --

8 THE COURT: He didn't ask you why.

9 THE WITNESS: He did.

10 MR. HRUSKA: I did. I violated the usual  
11 rule of cross-examination. I am really interested in  
12 knowing why.

13 A Because MCA is a producer of television motion  
14 pictures as we have already stated. Is that correct?  
15 We understand that?

16 Q MCA is a producer of motion pictures?

17 A Television motion pictures.

18 Q Right.

19 A Under the present system Universal Television  
20 pays its composer a sum of money to compose music for a  
21 television program. The price is determined in some  
22 respect by the amount of money that that composer can  
23 anticipate receiving from ASCAP or BMI as the case may  
24 be.

25 Now, if ASCAP or BMI no longer licensed

2 television networks, presumably the price that we would  
3 have to pay for that music would go up so to that extent  
4 it wuld be against our interest to have ASCAP go out of  
5 licensing.

6 Q How about the interests of the MCA Music  
7 Publishing Companies that is iistinguished from the parent  
8 company?

9 A I think the same would apply for different  
10 reasons.

11 Q Would you tell me those reasons?

12 A Yes.

13 Q When you say the same, you feel it would be  
14 against the interest of the MCA Music Publishing Companies  
15 for ASCAP to stop licensing television networks?

16 A That's correct.

17 Q Now could you give us the reasons?

18 A Under the present system where we have a  
19 blanket license, compositoins are chosen by producers  
20 and by users without any respect to price. They choose the  
21 composition which they think will be best for the  
22 program. If we got to a situation where we would have  
23 either a per use license or a direct licensing scheme, those  
24 compositions which are interchangeable -- let's take the  
25 per-use license scheme to start.

2                 No, I don't want to talk about the per use right  
3 now. This testimony is complicated enough. Let's limit  
4 ourselves to the proposition that -- whether or not it is  
5 in the best interests -- strike that -- the reasons why  
6 it is not in the best interest for -- the best interest  
7 of MCA Music publishing companies for ASCAP to get out of  
8 the business of licensing television --

9                 THE COURT: I certainly don't want to complicate  
10 the situation because I am a person who suffers as much  
11 as anybody from the complications but I do think it is  
12 reasonable that we posit what the alternative is going to  
13 be. I think you can't just get out of ASCAP licensing  
14 without -- and make any intelligent conclusion whether it  
15 is to your advantage or not unless you know what the alterna-  
16 tive is.

17                 It doesn't have to be per use. It might be  
18 direct licensing. I don't know what you have in mind.

19                 MR. HRUSKA: The alternative would not be a  
20 per use system in this question. And we are not talking  
21 in this question about a judicially --

22                 THE COURT: Doesn't that pretty well leave you  
23 with direct licensing arrangements of some kind?

24                 MR. HRUSKA: That's right. Whatever would take  
25 the place of ASCAP and really I suppose the question gets

2      into what in Mr. Chiantia's mind would take the place.

3      Q      ASCAP gets out.

4            THE COURT: Supposing the Court enjoined ASCAP.

5            Would that meet the purposes of your question?

6            MR. HRUSKA: No, sir. I do not want to do it  
7            that way.

8            THE COURT: All right.

9            MR. HRUSKA: I am just assuming that ASCAP  
10          gets out of the field of licensing television networks.

11          THE WITNESS: Why would it get out?

12          Q      Let's forget about why. It is out.

13          A      I don't understand why ASCAP would suddenly  
14          decide to get out --

15          THE COURT: I am not sure I understand that,  
16          but I agree with Mr. Hruska he has a right to ask the  
17          question which may later turn out to be worthless, but if  
18          you were faced with a situation which, for whatever reason,  
19          brought about withdrawal of ASCAP and BMI from licensing,  
20          Number 1, what would your course of action be? There is  
21          no per use system assumed. There is no court action. There  
22          is nothing. And Number 2, and I think this is what Mr.  
23          Hruska is reaching for, what would you consider to be the  
24          advantages and disadvantages of that arrangement over what  
25          you are presently doing, to MCA, is that right?

Chiantia-cross

MR. HRUSKA: That is essentially it. The witness said it would be disadvantageous so we are really asking for the disadvantages.

THE COURT: All right.

A If ASCAP were not licensing, naturally, I would engage in negotiations for direct licensing. Now, whether or not ultimately it would be advantageous or disadvantageous to me, I don't know. My guess at this point is that it would probably be disadvantageous. I would probably get less use of my music in direct licensing than I would get in a situation in which we have a blanket licence.

THE COURT: What is it that makes you conclude even if only tentatively that, what are the factors in your mind when you say that your guess is that you would have less use of your music?

THE WITNESS: Well, under the present system, your Honor, a producer of a program can use as much or as little music as he pleases, the price is the same. CBS pays a certain performance -- a certain fee for the right to perform all of the music. If he suddenly became budget-conscious, he might reduce the amount of compositions that he is going to use in his show.

THE COURT: What would be the feasibility, would you think, if you had to go on your own, to speak,

of granting blanket licenses on your part to networks?

THE WITNESS: It might work, your Honor. It might work.

Q Well, Mr.Chiantia, let's change the assumptions a bit. Assume that you suddenly -- that suddenly the CBS television network cancels its ASCAP licenses, say it has a right to do that and it does it. Let's say the NBC television network and the ABC television network retain their ASCAP licenses. And in short, CBS is now in the method of attempting to bypass ASCAP. You understand what that means?

A Yes.

Q Is that a situation which you think is in the best interests of the MCA music publishing companies? Or would you prefer that CTN retain its ASCAP licenses?

A Yes, I have already testified I would prefer that they retain it, yes.

Q And do you also believe that it is in the best interests of the music publishing industry that CBS or CTN retain its ASCAP license rather than attempt to bypass?

A In a direct license?

Q Rather than attempt to bypass by direct license.

A Well, as I say, I have already testified that I am very satisfied with the system that we have had. It has worked very well and I see no reason to change it.

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Chiantia-cross

2                     Based on that experience I would think that  
3                     we would be better off with the present system.

4                     Q      So you would want a CTN bypass to fail, is that  
5                     true?

6                     A      No, not necessarily.

7                     Q      You see, there is where we have problems. If  
8                     you like the present system and you prefer the present system,  
9                     why is it that you would not want a CTN bypass to fail?

10                  A      My primary responsibility is to get my music  
11                  played. To get it exposed. And if I have to go to CBS  
12                  in a direct licensing scheme, I am going to go. I am not  
13                  going to sit back and say, I hope you fail. I want you to  
14                  use my music and I am going to try to make it work.

15                  Q      That is not the question, Mr. Chiantia.

16                  A      I have difficulty sometimes understanding your  
17                  questions, Mr. Hruska.

18                  THE COURT: I think that was a fair answer, Mr.  
19                  Hruska. You can ask another question if you want to.

20                  Q      Would you prefer that the bypass by CTN failed  
21                  or would you prefer that it succeeded?

22                  A      I don't care either way. If they don't want to  
23                  license through ASCAP, that is all right with me. I prefer  
24                  it this way. If they decide to go there own way, that is  
25

1 sb-6

Chiantia-cross

2 all right with me, provided they have to deal with me at  
3 arms' length. And that would be perfectly okay with me.

4 THE COURT: I think after that eloquent state-  
5 ment, it is time for us to take an afternoon break.

6 (Recess.)

7 BY MR. HRUSKA:

8 Q I would like to show you, Mr. Chiantia, a five-  
9 page exhibit that has been marked for identification as  
10 PY#05, and ask you to identify that document.

11 A Yes, it is a consolidated income statement for  
12 MCA Music.

13 Q For the years?

14 A For the 12 months ended December 31, 1968.

15 Q And --

16 A I am sorry. '69, '70, '71, and November 30, 1972.

17 MR. HRUSKA: I would like to offer this document  
18 in evidence, your Honor.

19 MR. TOPKIS: May I see it, please?

20 THE COURT: For the purpose of supporting the  
21 computation you made?

22 MR. HRUSKA: Yes, your Honor. The purpose for  
23 which it was used on cross-examination.

24 THE COURT: Hand it to Mr. Topkis and see if he  
25 has any objection. You raised the objection before about

2 confidentiality. I think the only thing he was asked  
3 about at that time was whether he was willing to have the  
4 CTN revenue discussed openly and he said yes to that.

5 MR. HRUSKA: That was, of course, the only thing  
6 that was disclosed openly. I would like to put the documents  
7 in evidence. I have no objection to their being received  
8 in camera.

9 MR. TOPKIS: I don't understand. What is their  
10 relevance?

11 THE COURT: Go ahead.

12 MR. HRUSKA: The relevance of them was brought  
13 out on cross-examination. Of course, these would be the  
14 documents which support the computation made on cross-  
15 examination.

16 MR. TOPKIS: I will accept the computation if  
17 it is accurate. That ends it.

18 THE COURT: Then you don't need the statement, do  
19 you?

20 MR. HRUSKA: Mr. Topkis, as I heard him, he just  
21 said he could accept the computation if it is accurate.

22 MR. TOPKIS: Show me the figures. I don't  
23 want to invade somebody's privacy that doesn't have to be  
24 invaded.

25 THE COURT: If there is a problem about computing

28-8

#### Chianti-class

it, then I will have to look at it.

MR. TOPKIS: Fine.

We had established before the break, Mr.

Chiantia, that under the AGAC contract, the contract which  
MCA music publishing companies has with AGAC writers, that  
MCA does not have the right to license directly for television  
network use without the consent of the AGAC writers. I  
now ask you to --

#### A Television performance.

0 Television performances, right.

I now ask you to assume that tomorrow the CBS television network were to cancel its ASCAP license and that NBC and ABC were to retain their ASCAP licenses, so that to the extent performance rights would be obtained by producers of CTN programs, they would have to be obtained, if at all, by direct licensing. Would it be practical for you as a music publisher to enter into the business of direct licensing producers of CTN programs having to obtain for each transaction which involved an AGAC song, a song written by an AGAC writer, the consent of that writer?

A It would not be that difficult.

Q It would not be difficult?

A It would not be that difficult.

Q      Wouldn't this be a hurdle in your path?

zb-9

### **Chiantia-cross**

A It might very well be, yes.

THE COURT: Well, I am a little confused at  
reconciling your two answers.

On the one hand you said it wouldn't be that difficult. On the other hand, you said it might be an obstacle. Are you saying in effect it might be an obstacle but not a big obstacle?

THE WITNESS: I am saying in the case where that is the only alternative I have, I have to evolve a system of getting permissions and I am sure in the long run I could probably do so. But it would be an additional hurdle in my path. There is no question about it.

THE COURT: You mean it would be another thing  
you would have to do?

THE WITNESS: Precisely.

O Do you think you could do this? Do you think it would be practicable to do this if each time you were asked to bid on a direct licensing transaction for the business of a producer of a television program to appear on CTN, you had to make contact with the AGAC writer and get his consent?

A I do that now with respect to synchronization rights.

1           zb-10

Chiantia-cross

2           Q     Are you sure, sir?

3           A     Motion picture synchronization rights, yes.

4           Q     And you think this would be practicable as to  
5 television --6           A     It would be practicable. It would be more diffi-  
7 cult than obtaining synchronization licenses for motion  
8 pictures, but we can evolve some kind of machinery.9           THE COURT: Why would it be more difficult  
10 mechanically?11          THE WITNESS: Except that the use in television  
12 would be probable more frequent than the use in theatrical  
13 motion pictures.14          THE COURT: I don't like to brainwash you,  
15 but do you suppose that under such circumstances you would  
16 be likely to work out some kind of overall framework with  
17 them as to --

18          THE WITNESS: With the songwriter?

19          THE COURT: Yes, so you wouldn't have to call him  
20 every time somebody spoke to you?21          THE WITNESS: There are some songwriters with  
22 whom you can make such an arrangement. I have some exper-  
23 ience with songwriters which makes it difficult for me to  
24 quote synchronization rights. I must indeed get in touch

1           zb-11

Chiantia-cross

2           with him in every case.

3           Q       I would like to show you a document, Mr.  
4           Chiantia, which is PX84 for identification. Specifically  
5           I would like to direct your attention to --

6           A       May I read it, please?

7           Q       Yes. I am just going to tell you what I am  
8           primarily going to be examining you about, sir, is the  
9           second paragraph.

10          A       May I read the whole letter anyway?

11          Q       Of course. Please do.

12          A       Okay.

13          Q       You will see in the second paragraph, the first  
14           sentence of the second paragraph there is a clause which  
15           reads, "If we have to"-- excuse me. I am sorry. I really  
16           ought to identify this document.17          This document is a letter that you wrote, Mr.  
18          Chiantia?

19          A       Yes.

20          Q       And you wrote it on October 29, 1959, and you  
21           wrote it to Miss Miriam Stern of AGAC?

22          A       Right.

23          Q       Do you know who Miss Miriam Stern is or was at  
24           that time?

25          A       Yes.

2      Q      Could you state for the record?

3      A      I believe her official title was secretary --  
4                executive secretary of American Guild of Authors and Com-  
5                posers.

6                THE COURT: What did you say the date was?

7                MR. HRUSKA: October 29, 1959.

8                THE COURT: Is there any reason why this letter  
9                shouldn't be in evidence?

10          MR. HRUSKA: It should be in evidence.

11          THE COURT: Any objection?

12          MR. TOPKIS: No objection.

13          THE COURT: It is received in evidence.

14          (Plaintiff's Exhibit PX84 was received  
15                in evidence.)

16          THE COURT: Go ahead, Mr. Hruska.

17          Q      The statement reads "If we have to obtain the  
18                written consent of each writer for each video, we would for  
19                all practical purposes never get the compositions from our  
20                catalogs into current TV films other than in a few rare  
21                instances."

22          The situation you were discussing in this letter  
23                Mr. Chiantia, referred to the licensing of synchronization  
24                rights to the producer of television programs, right?

25          A      That's correct.

Q What differentiates the licensing of synchronization rights to television producers from the licensing of performance rights to television producers which makes it impracticable to obtain writer consent on each individual sync rights transaction but not impracticable to obtain such consents in that fashion on each individual performance rights transaction?

A In order to understand what this letter is about, we have to understand what was happening then at the time.

At the time television producers were using canned music. Very few productions were actually having scores especially written for television programs. There was some, of course, but a good number of them were using canned music as background music. We had at that time a recorded library. The term which is used is mood music. Mood music library. It was our idea to use those tapes of compositions which had been recorded for us by orchestras around the world and we had a great deal of Russian material as well that was recorded and it was our idea to use that material and persuade television producers to use those tapes as the canned music for the background music.

Now, what I wanted to do was to make this available to them on a blanket basis and if I had to get the

1 permission of each writer every time a television producer  
2 wanted to use a little snippet in a background music use,  
3 it would be difficult and the background -- and the tele-  
4 vision producer would want immediate availability because  
5 the music was not that important.  
6

7 If that particular piece was not important,  
8 he could take something else. So then it was important for  
9 me to have blanket clearance, blanket permission at the  
10 time.

11 Q And yc feel that you would have no need for  
12 blanket clearance in the licensing of performance rights?

13 A If I could work it out, it would be very con-  
14 venient. There are many compositions which I hold in  
15 my catalog which I did not acquire under an AGAC agreement.

16 With respect to those I would have no difficulty  
17 at all.

18 Q I know it would be convenient if you could work  
19 it out. The question is if you could not work it out.  
20 You still believe that it would be a practical thing to do,  
21 to call a writer each time a television producer called you  
22 to find out whether you could get that writer's consent?

23 A What we are talking about is a hypothetical  
24 world. If we are talking about a hypothetical world, I  
25 submit to you that my humble opinion is and my opinion based

3  
on my experience is that I can persuade my writers to  
4 give me permission on anything provided they are convinced  
5 that I am doing what is right for them and right for the  
song.

6 Q My question is, Mr.Chiantia, not whether you  
7 could persuade your writers to give you blanket consent up  
8 front, whether you could persuade your -- whether you could  
9 engage successfully in this business as a practical matter  
10 if every time a television producer called you for the right  
11 to use a particular song you had to get the consent of your  
writer?

13 A With all due respect to you, wouldn't that be  
14 my problem? I would have to survive and if I could not  
15 get these permissions I would be the one to suffer, not you.  
16 I would go out of business, not you.

17 THE COURT: I think even Mr. Hruska might  
18 sympathize with you under those circumstances but the question  
19 isn't whether you would go out of business. The question  
20 is -- rather, who suffers the injury involved. The question  
21 is whether under such circumstances you could operate on  
22 a practical basis.

23 THE WITNESS: I think I could.

24 Q Are you familiar, Mr. Chiantia, with the schedules

under which television programs are put together?

A What --

MR. TOPKIS: What kind of programs are we talking about?

Q Let's take music variety programs.

MR. TOPKIS: I thought we would. How about the other --

Q Let's take music variety programs. Are you familiar with the schedules under which --

A In a very general way.

Q Do you know how much time a television producer had to put that show together?

THE COURT: I don't know it is terribly important whether he knows or not. If you want to ask him if he can accomplish the securing of the licensing within X days or hours, then later relate it to what other witnesses have told us they need, I think that is the way to do it.

Q Let us assume that you had to, in order to obtain this sort of business, get your writer's consent for the use of your music in either a variety or a non-variety program within a day. Would this be a serious obstacle to your being able to engage in this business?

A I don't know of any circumstances in which a TV producer would have to make up his mind in a day.

2 Q That is not my question, Mr. Chiantia. I am  
3 asking you to assume for a moment one day. Is this a serious  
4 obstacle or is it not?

5 A I can assume the world is going to end tomorrow.

6 THE COURT: Please make the assumption, Mr.  
7 Chiantia. If, for example, there are witnesses who have  
8 testified to that earlier in the trial, then the question  
9 would be proper. I can't remember offhand. I don't  
10 want to argue about it.

11 In effect would it be a big obstacle if you  
12 had to get consent of your writers within a day?

13 THE WITNESS: In some cases, yes, it could be.

14 Q How about two days?

15 A That depends on who the writer is, where he is  
16 situated, how well he is accessible. You are posing hypo-  
17 thetical questions.

18 Q The point is, there are a lot of your writers  
19 who are not immediately accessible to you, isn't that so?

20 A Do you mean one day?

21 Q That you can't reach them if you wanted to  
22 within a day?

23 A There are some writers I can't reach in one  
24 day, that's correct.

2  
Q And there are a number of writers you couldn't  
3 reach in two days either?

4 A But, Mr. Hruska, in that situation I would make  
5 it my business in advance to make sure I got to them all and  
6 explained what my situation was and got their permission.

7 Q Up front in advance?

8 A Yes.

9 Q That is what you would want to do?

10 A I would try to do it. It is no different than  
11 the situation with respect to synchronization rights. Why  
12 do you have any greater difficulty in this matter than you  
13 have in synchronization rights? There are certain synchron-  
14 ization rights that you need that I have to get my writer's  
15 permission on and you get them . Why suddenly do you have  
16 such a great problem in respect of getting performance  
17 licenses where you don't have that same problem in getting  
18 synchronization licenses?

19 Q At the end of the trial, Mr. Chiantia, I will  
20 answer all your questions.

21 A I wish you would. As a matter of fact, I might  
22 hire you as a consultant to tell me how to run my business.

23 Q I think that is still another conflict.  
24 You got this pre-consent, this pre-blanket consent  
25 in television sync rights, right?

2  
A Yes. In certain cases.

3  
Q You worked out an arrangement with AGAC, is  
4  
that true?

5  
A I was asked about that in pretrial testimony.  
6  
I don't really remember that. Suffice it to say that I  
7  
do give licenses. I don't remember how we worked it out  
8  
but we do give licenses and I have had no objection from  
9  
anybody so far. One or two exceptions.

10  
Q When you say you worked it out, you have an  
11  
arrangement with your AGAC writers under which you agree  
12  
not to charge any less than certain minimum fees, isn't that  
13  
true?

14  
A That is not true. We did not sign all of those --  
15  
we did not sign all of those synchronization schedules.  
16  
Let me remind you that I am mostly concerned with background  
17  
music uses. With respect to background music uses I  
18  
do not need the permission of the writer. Provided the  
19  
song is less than ten years old.

20  
Q You are talking AGAC writers?

21  
A That is correct, sir.

22  
Q And you are talking sync rights?

23  
A That is correct.

24  
Q Where you needed the consent of the writer, you  
25  
got that consent up front and you got it by agreeing to

2      certain -- not to charge less than certain minimum fees?

3            A      My recollection, sir, is that we never signed  
4      those agreements. That is my recollection. I may be wrong.

5            Q      With AGAC writers with respect to feature  
6      performances?

7            A      I beg your pardon?

8            Q      With AGAC writers with respect to feature  
9      performances?

10          A      That's correct.

11          Q      You never signed those?

12          A      That is my recollection. I may be incorrect but  
13      that is my recollection. Suffice it to say that I do  
14      license. And I have had no complaints.

15          Q      Well, I don't know that I have to go through the  
16      testimony on deposition. You have already referred to the  
17      fact, Mr. Chiantia, that you testified to the opposite  
18      point during your deposition regarding your deposition --

19          A      I did not say that, sir. I said during the time  
20      that I was being deposed, I really did not remember what the  
21      synchronization schedule was. In the meantime I looked  
22      at it. I did not remember at the time of my deposition.  
23      I did not testify that we signed.

24          Q      You did say in this letter, PX84, "We are" --  
25      this is your letter to AGAC -- "We are ready to submit

2      synchronization schedules which we have received to AGAC  
3      for counter signatures. And I look forward to hearing from  
4      you in this regard."

5      Doesn't that refresh your recollection that you  
6      had signed such synchronization schedules containing minimum  
7      synchronization fees with writers prior to your submitting  
8      them to AGAC for counter signature?

9      A      No. What I was referring to was the counter  
10     signature. I do not recall sending them to AGAC for counter  
11     signature.

12     Q      I see. But you did sign such agreements with  
13     your AGAC writers?

14     A      That's correct.

15     Q      And those agreements did set forth minimum figures  
16     on sync rights?

17     A      That is correct. But that was at the very be-  
18     ginning. We have not done it since.

19     THE COURT: Since when? This is 1959 now.

20     THE WITNESS: In about the last five or six  
21     years, your Honor, I don't think we have ever signed  
22     synchronization schedules with any writer.

23     Q      In the last five or six years?

24     A      Yes.

25     Q      But there was a time between 1959 and the last

1      zb-22

2      Chiantia-cross

3      five or six years when you had new synchronization right  
4      schedules that were signed with your writers?

5      A      Yes. I will be glad to find out for you how  
6      many there were. I just don't remember.

7      Q      But the last ones that were signed, those are  
8      agreements between you and your writers which are still in  
9      effect, true?

10     A      Correct.

11     Q      There was no need to sign any new ones?

12     A      That is not true. We are only talking about  
13     a specified number of compositions. I don't remember how  
14     many of these I signed. And I am telling you that the last  
15     five or six years we have not signed any new ones. In the  
16     last five or six years I think you will assume -- you will  
17     agree that we have acquired other compositions.

18     Q      In the last five or six years, sir, your writers  
19     are really coming from a different source, new writers,  
20     different from the source represented by the AGAC sort  
21     of writer, isn't that true?

22     A      Correct.

23     Q      You didn't experience after or before writing  
24     this letter, which is PX84, you didn't experience any  
25     particular difficulty in working out this problem with

2 AGAC, did you?

3 A Mr. Hruska, I believe -- I don't remember what  
4 happened at that time. I really don't. All I remember  
5 is that we did go ahead and license. But I don't remember  
6 experiencing any great difficulty with anybody at the time.  
7 That is my honest recollection.

8 Q Do you recall having received a letter from  
9 AGAC prior to October 29, 1959, in which AGAC complained  
10 about the fact that publishers had been licensing sync rights  
11 for television use without obtaining AGAC writer consent?

12 A I may have received such a letter. I don't  
13 remember. I may have received such a letter, but I don't  
14 remember.

15 Q You are aware of the fact that ASCAP does not  
16 license sync rights?

17 A I beg your pardon?

18 Q I say, are you aware of the fact that ASCAP  
19 does not license sync rights?

20 A I would hope so.

21 THE COURT: Why?

22 THE WITNESS: I mean I hope I am aware of that.

23 THE COURT: What is your definition of sync  
24 rights?

25 THE WITNESS: Synchronization rights, your

2 Honor, is the right to mechanically record a composition  
3 in connection with a motion picture or television motion  
4 picture.

5 Q Would you agree, Mr. Chiantia, that the history  
6 of the music business has been characterized by conflict  
7 between writers and publishers?

8 A Oh, yes.

9 Q And in your experience are writers suspicious  
10 of up front money deals, which I believe is the way they  
11 are referred to in the industry?

12 A You have to define that a little more for me,  
13 Mr. Hruska.

14 Q All right. There are certain arrangements that  
15 publishers from time to time through the years have made  
16 with publishers of sheet music in which the print houses,  
17 they are called, in which the print house would give the  
18 publisher a very large advance -- you got it, okay. Why  
19 don't you continue?

20 A I believe you are referring to a situation which  
21 I testified to in the deposition.

22 Q Right.

23 A Which had to do with the use of compositions in  
24 so-called song sheets. Yes, I am aware of that situation.

25 At that time music publishers were receiving

2 substantial advances for the use of their catalogs for  
3 the right to print all of the compositions in the publisher's  
4 catalog in so-called single sheets and the publisher in  
5 those cases would make his distribution to the writers on  
6 the basis of a stipulated sum for each use. And AGAC was  
7 complaining about this situation because it was one in  
8 which the publisher could wind up with much more money at  
9 the end than the writers collectively.

10 Q In other words, the publisher might get an advance  
11 of twenty or \$30,000 --

12 A And may have paid out ten.

13 Q From the print shop, and then get an agreed upon  
14 royalty figure of, say, a small per cent of revenue for  
15 the actual -- on the actual sale of the sheet music,  
16 distribute the per cent commission to the writers, but not  
17 distribute the advance?

18 A That is correct.

19 MR. TOPKIS: If your Honor please, is there  
any conceivable relevance to this? It is perhaps fascinat-  
20 ing but --

21 THE COURT: I am not sure but there have been  
many things throughout the trial and I found it easiest  
22 to take it.

23 MR. TOPKIS: It has taken five weeks and one

2      day to date.

3            Q      This type of situation, the advance we have  
4      just been discussing, this is a fairly notorious kind of  
5      transaction in the business, isn't it? I mean this is  
6      usually regarded as a reprehensible thing to do?

7            A      Would you please go back in the past tense.  
8      That happened many, many years ago. I am not aware of any  
9      situation similar to that that has occurred in the last five  
10     or ten years.

11          Q      You are not aware of any such situation coming  
12     to public light?

13          A      Right.

14          Q      Was this one of the situations, the types of  
15     situations which gave rise to the formation of AGAC, if you  
16     know?

17          MR.TOPKIS: AGAC was formed in 1937 or something  
18     like that.

19          Q      All right, is this -- I withdraw the question.  
20     Is this one of the problems with which AGAC is particularly  
21     interested?

22          A      It was at the time, yes.

23          Q      You don't sign AGAC contracts with your writers  
24     if you can help it, do you?

1      zb-27

Chiantia-cross

2      A      What do you mean by that?

3      Q      You prefer not signing the AGAC contract. You  
4      prefer using your own form?5      A      My deal fellow, I prefer getting the best  
6      song I can possibly buy and if the fellow who wrote it is  
7      an AGAC member, I am happy to sign it.8      Q      If he didn't care, you would prefer your own  
9      contract?

10     A      Yes, of course.

11     Q      How about a non-AGAC member, would you give an  
12     AGAC form contract to a non-AGAC writer?13     A      No, I would not. Unless he specifically requested  
14     it.15     Q      And he had the bargaining power, the clout to  
16     get you to sign such an agreement?

17     A      Correct.

18     Q      Now I would like to turn to the 3M matter.  
19     I don't know that I have to go through the mechanics of  
20     showing you the Leeds agreement. You have been through this  
21     recently, haven't you?

22     A      Not recently, but I know about it.

23     Q      You know about it. And this was dated, just  
24     for the record, March 1, 1965, and at Paragraph 10, I think  
25

2      it is, 3M agrees to use 100 Leeds songs and under Paragraph  
3      12 guarantees to Leeds \$30,000 a year.

4                THE COURT: Do you want to refer to the exhibit  
5      number, please, Mr. Hruska?

6                MR. HRUSKA: 52, your Honor. I am sorry, it  
7      is 3M PX52.

8                Q        Now, you were first approached by Allen Arrow  
9      on this 3M transaction. Mr. Arrow has testified that that  
10     date was October 29, 1964. Does that sound about right to  
11     you?

12      A        Yes.

13      Q        Now, between that date and March 1 of '65, which  
14     is the date of this agreement, 3M PX52, Mr. Arrow also said  
15     that he had about 50 contacts with you. Does that sound  
16     about right, on this subject of 3M?

17      A        Well, I can't recall whether there were 25  
18     or 50, but I do recall there were quite a few.

19      Q        The case will not turn on it. Whether it is  
20     25 or 30.

21      A        I understand that.

22      MR. TOPKIS: Could we know what page you are  
23     referring to?

24      MR. HRUSKA: Arrow?

25      MR. TOPKIS: Yes.

289.

2 MR. HRUSKA: It was in his deposition at Page

4 MR. TOPKIS: Is it in the record of this case?

5 MR. HRUSKA: No.

6 MR. TOPKIS: All right.

7 Q Now, you gave some testimony this morning, Mr.  
8 Chantia, about 3M PX51, which is another agreement between  
9 you and 3M, dated March 1, 1965, concerning the additional  
10 \$15,000.

11 Did you distribute any part of that \$15,000  
12 to any of your writers?

13 A Certainly.

14 Q Excuse me?

15 A Certainly.

16 Q To which writers?

17 A To all the writers that participated in the pro-  
gram. It was an advance against the royalties.

18 Q You distributed to them when you received the  
19 royalties --

20 A As I always do when I receive an advance.

21 Q How did you make distributions to the writers?

22 A On the basis of three cents and two cents. What  
23 other basis would there be?

24 Q In effect, a per use basis. The basis of their

zb-30

Chiantia-cross

songs --

MR. TOPKIS: I can't imagine it was on a per use basis.

A On the basis of the use in the program, that is correct.

Q On the basis of the use in the program. Wouldn't you refer to that as a per use basis?

MR. TOPKIS: Not after this case.

A Okay.

Q That is not a novel concept to you, is it, Mr. Chiantia?

A No, it is not a novel concept to me.

Q You testified on the deposition that you and Mr. Brettler shared the view that the direct licensing of 3M would produce a lot of money for each of your publishing groups -- Page 153 -- as much as 500,000 apiece. Are you aware of the total annual ASCAP --

MR. TOPKIS: Wait, wait, wait. Your Honor, may I read to the witness the material that has just been attempted to be summarized? I think he has been asked a most unfair question and I would like to clear up the record.

I will ask that the question be stricken. I rise to object.

2  
THE COURT: Let me see the record and I will  
3  
see whether I agree that it was unfairly characterized.  
4

MR. TOPKIS: Start at Page 152, please, Line 21.

5  
THE COURT: What reference did you make, Mr.  
6  
Hruska?

7  
MR. HRUSKA: I characterized from Page 153,  
8  
Lines 8 through 12.

9  
THE COURT: All right. I am not quite sure, Mr.  
10 Topkis, whether you are referring to the spread there,  
11 which is -- whether your objection was based on the fact  
12 when Mr. Chiantia testified on deposition, he didn't specify  
13 as to a particular amount but a range, which is between  
14 two and 500,000.

15 MR. TOPKIS: Which the high end was 500,000.  
16 The low end was 200,000 and the whole answer was preceded  
17 by the comment, "my answer would have to be speculative."

18 MR. HRUSKA: The question was, your Honor, as  
19 much as \$500,000, and I think on cross-examination, par-  
20 ticularly it is perfectly appropriate --

21 THE COURT: Do you understand?

22 THE WITNESS: Yes.

23 THE COURT: The witness understands. Let's proceed  
24 with what you are now asking.

25 Q Are you aware of your total annual ASCAP

1 distribution from all wire music services?

2 A At this moment?

3 THE COURT: You mean for '73?

4 Q Let's take it back in the mid-sixties. Do you  
5 know what it was then?

6 A I don't --

7 Q You don't now remember what it was?

8 A I was not aware at the time.

9 Q Are you aware now what it is?

10 A Yes.

11 Q What is it?

12 A Somewhere around thirty, \$35,000 a year.

13 Q \$35,000 a year. Is it fair to say it was sub-  
14 stantially smaller in 1964?

15 A I can't say because it was not reported at that  
16 time.

17 Q You had no idea what it was?

18 A No.

19 Q You never made it your business to find out?

20 A No.

21 Q You had no interest in it?

22 A I didn't say that.

23 Q Then why didn't you make an effort to find out  
24 what it was?

1           A     I just never did.

2           THE COURT: Anyway, what year did you say was  
3  
4           \$35,000?

5           THE WITNESS: It has been running about \$35,000.  
6  
7           your Honor.

8           THE COURT: In recent years?

9           THE WITNESS: Yes, since they started to report  
10           it --

11           THE COURT: Is there any reason to believe it  
12           would have been greater in 1964?

13           THE WITNESS: I have no idea, your Honor.

14           THE COURT: Don't you have an idea as to whether  
15           it would have been greater, significantly greater?

16           THE WITNESS: Well, it was not reported separately  
17           at the time. It may have been at that time -- I believe it  
18           was distributed as part of the general distribution. So  
19           I do not know.

20           Q     Do you know what it was in 1969, Mr. Chiantia?

21           A     In 1969 it could have been around that thirty,  
22           \$35,000. Something like that.

23           Q     It was a good deal smaller than that, wasn't it,  
24           sir?

25           A     I don't know. That is my recollection.

MR. TOPKIS: Is this subject properly an issue,

1           zb-34

2           Chiantia-cross

3           your Honor?

4           I didn't go into the subject on direct. While  
5           I haven't risen on that ground previously, I think there  
6           ought to be some bounds.

7           THE COURT: I think I have enough information  
8           to get the point Mr. Hruska is bringing to my attention.

9           Q        Mr. Brettler on his deposition testified that  
10          he analyzed the 3M situation in this manner and had reported  
11          this analysis to the ASCAP board and I will quote his testi-  
12          mony, which is at 348.

13           MR.TOPKIS: Just a second, please.

14           Q        Brettler: "I saw this as an experimental thing  
15          and if it happened on the scale that 3M expected, there  
16          were going to be more tapes. 3M would have to go back to  
17          ASCAP and possibly it was a fortunate thing for us to do  
18          this because if the venture succeeded and this became the  
19          modus operandi of background music, it would come back to  
20          ASCAP anyway."

21           Do you agree with that analysis -- did you at  
22          the time, put it that way, did you at the time agree with  
23          that analysis?

24           A        I don't believe Mr.Brettler ever communicated  
25          that to me. Are you saying that he did?

2      Q      No, no.

3      THE COURT: It is just a way of asking you whether  
4      that was your view at the time.

5      Q      Does this correspond with your view at the time?

6      A      No.

7      Q      Did you ever discuss this point with Brettler?

8      A      I don't recall.

9      Q      As to whether 3M if the venture succeeded would  
10     ultimately have to come back to ASCAP?

11     A      I don't recall that.

12     Q      You didn't reach any similar conclusions on  
13     your own?

14     A      No, I did not.

15     Q      When Mr. Arrow approached you in October of '64,  
16     he had been a friend of yours for years, is that so?

17     A      That's correct.

18     Q      And you knew him to be a man of honesty and  
19     integrity?

20     A      Yes, that's correct.

21     Q      And nothing has changed your estimation of Mr.  
22     Arrow, has it?

23     A      It has not.

24     Q      And Mr. Arrow is very knowledgeable in music

2  
publishing, a very savvy and sophisticated man?

3  
A Yes.

4  
Q And still is?

5  
A Yes, that's correct.

6  
Q And he explained the deal to you?

7  
A That's correct.

8  
Q And he also gave you reasons, did he, why  
9 there was no possibility of 3M reaching an agreement with  
10 ASCAP by the time that 3M wanted to record this music, which  
11 was April '65?

12  
A Yes.

13  
Q And he also estimated for you that the guarantee  
14 that 3M was paying was based on the 3M estimate of being  
15 able to sell 6000 tapes a year and -- strike that. Let me  
16 start over again.

17  
Did Mr.Arrow indicate to you that whereas the 3M  
18 guarantee of \$30,000 in the case of Leeds a year was based  
19 on a minimum estimate of their being able to sell 6000 tapes  
20 a year, their realistic expectation was to be able to sell  
21 a lot more, approximately double that figure?

22  
A I remember something of that kind, that conversa-  
23 tion.

24  
Q The first time you met Mr. Arrow, you didn't --  
25 and you got this presentation from him about what the deal --

2 what was involved in the deal, what it was about, you  
3 didn't agree with him right then and there that you would  
4 go ahead with the licensing of 3M, did you?

5 A No, I believe I told him I was interested in it  
6 and I was going to look into it, yes, that's correct.

7 Q You wanted to verify with ASCAP that its negotia-  
8 tions with 3M were in fact even dead?

9 A No, as I recall, Mr. Arrow told me that he could  
10 not get together with ASCAP on a price. I am trying to  
11 answer your question, Mr. Hruska, if you will bear with me.

12 Q I am bearing.

13 A Please. Well then, don't shake your head because  
14 I have had occasion to shake my head in your questioning  
15 and I didn't do it.

16 At that point I felt that I had to go to ASCAP  
17 to find out whether in fact they did not come to an agreement  
18 on price. Does that answer your question?

19 Q You did go see Mr. Korman, was it?

20 A That's correct.

21 Q At ASCAP?

22 A That's correct.

23 Q And you checked this out with him?

24 A That's correct.

25 THE COURT: Without quibbling about the details,

I take it you went to ASCAP to find out what their hangup was, is that right?

THE WITNESS: That's right.

Q But you wanted to find out that that deal had come apart, isn't that true?

A No, I wanted to find out why ASCAP was having difficulty licensing it. I was not aware that the deal had completely come apart. I recall that Mr. Arrow told me he was having some trouble getting an ASCAP license. Would I license him. I said fine, I think I may do that. Let me find out what this program is about.

THE COURT: Let's take the bull by the horns. Was it in your mind a condition that ASCAP should be sour on the deal before you would have anything to do with it?

THE WITNESS: No, sir, not completely. I would rather that ASCAP had licensed. However, if it were a situation where I would have made a better deal with Mr. Arrow directly, I would have made the deal directly.

Q At Line 11, Mr. Arrow gave -- made this statement in his testimony:

"Well, I think he" -- which refers to you, sir -- "did say at some time during our discussions, I can't recall specifically whether it was at that first meeting, that he wanted to verify with ASCAP that our negotiations" meaning 3M --ASCAP negotiations -- "were in fact ended."

1 zB-39

2 Chiantia-cross

3 Does that refresh your recollection?

4 A I really don't remember it that way, Mr. Hruska.

5 Q Well then, why did you go check with ASCAP at  
all?6 A To find out why they were having difficulty  
7 licensing.

8 Q Why did you care?

9 A I have just told you before I would rather they  
10 had licensed through ASCAP.11 Q If you prefer that 3M licensed through ASCAP,  
12 isn't it fair to say, Mr. Chiantia, that what you were check-  
13 ing out with ASCAP was to see whether or not those negotia-  
14 tions had in fact ended?15 A No, not necessarily. I wanted to find out why  
16 ASCAP was having difficulty licensing this, where they had  
17 no difficulty in licensing other uses. I wanted to know  
18 what ASCAP knew about it and to help me to make up my mind  
19 what I was going to go into -- whether I was going to go into  
20 that program.21 Q You thought it was in the best interests of the  
22 music publishing industry that performing rights be licensed  
23 through the societies, true?

24 A I think that is true as a general matter, yes.

2 Q And that was true in this 3M situation?

3 A It is true in any situation.

4 Q And isn't this the reason you checked with  
5 ASCAP?

6 A Mr. Hruska, I have already answered the question.

7 THE COURT: I think he answered, Mr. Hruska.

8 You can argue what you wish that I shouldn't believe what  
9 Mr. Chiantia has said, but I believe he has answered the  
10 question amply.

11 Q You think it is in the best interests of the  
12 MCA music publishing companies for ASCAP to license 3M  
13 rather than for those companies to license 3M directly?  
14 Which would you prefer?

15 A I would prefer --

16 MR. TOPKIS: Is that question today or 1964?

17 THE COURT: Now I assume it is as of today.

18 MR. HRUSKA: That is what the question said.

19 THE COURT: It was in the present tense.

20 MR. TOPKIS: Then the witness must first be  
21 asked, does he believe it in the best interest of MCA.

22 THE COURT: I thought that is what he did ask.

23 Will you read back the question, please?

24 (Question read.)

25 THE COURT: You mean ASCAP to license 3M or

2 ASCAP to license the music only?

3 MR. HRUSKA: Do you prefer --

4 THE COURT: Are you talking about 3M?

5 MR. HRUSKA: Yes.

6 THE COURT: I must say I am confused. I thought  
7 you were talking about MCA when you said 3M. Is there a  
8 3M project today that you are talking about?

9 Q To avoid any confusion, let's take it back to  
10 1964, when you were having these discussions with Allen  
11 Arrow and Allen Arrow played his pitch to you and outlined  
12 the deal. Would you have preferred at that point in time  
13 for ASCAP to have suddenly taken over the 3M matter in the  
14 sense of reaching an agreement with 3M, or would you have  
15 preferred to directly license 3M?

16 A I would have preferred that ASCAP do it for  
17 a very simple reason.

18 Q What is that reason?

19 A For policing purposes.

20 Q Policing purposes?

21 A That's right.

22 Q That is your ownly reason?

23 A That's correct.

24 Q Let's discuss policing.

2 MR. TOPKIS: Your Honor, he asked two questions  
3 about 3M. I really think they will be on it forever.  
4 We beat that dead horse for a week last time around. There  
5 is no question about what happened here. Mr. Chiantia,  
6 whatever his impulses, whatever his belief as to the best  
7 interests or the poorer interests of MCA went out and signed  
8 up people for the 3M program. It was all done. Why in  
9 the name of heavens would we have to rehash it over and  
10 over again.

11 In point of fact to leap ahead Mr. Chiantia is  
12 engaged in negotiations today with 3M for new contracts.

13 THE COURT: I don't think that is part of the  
14 record, so I will disregard that particular statement. If  
15 you want to bring it out if it is relevant --

16 MR. TOPKIS: Your Honor, you asked the question.  
17 That is why I supplied the answer.

18 THE COURT: I asked whether there was a project  
19 going on. I didn't ask particularly about their negotia-  
20 tions.

21 To the extent that anybody goes beyond direct  
22 examination, and I think that the questions about  
23 policing might or might not be such, that witness will  
24 become the questioner's witness. I will allow a reasonable  
25 amount with regard to the extent to which ASCAP can police

1                   sb-43

Chiantia-cross

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2                   matters of this kind more effectively than other organiza-  
3                   tions because I think it is not relevant only to the  
4                   3M situation, but it has a kind of general applicability.

5                   However, I won't allow it it this evening  
6                   because it is 25 minutes past four, and I have a hearing  
7                   which is beginning at 4:30, and I have to make arrangements  
8                   for it, besides which I think you are all getting a little  
9                   testy, so I will excuse you.

10                  MR. HRUSKA: Your Honor, there is the matter of  
11                  Miss Preston. Shall we have her report tomorrow morning?

12                  THE COURT: We are in adjournment until ten  
13                  o'clock tomorrow morning.

14                  (Adjourned to Tuesday, November 27, 1973,  
15                  at 10:00 A.M.)

16                  -----

17  
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21  
22  
23  
24  
25

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1

April 24, 1974

Southern District Court Reporters  
United States Court House  
Foley Square  
New York, New York

CBS v. ASCAP, et al.

Gentlemen:

Please prepare an addendum of corrections to the trial transcript for the week of November 26, 1973 as follows:

November 26, 1973

<u>PAGE</u>	<u>LINE</u>	<u>ERROR</u>	<u>CHANGE TO</u>
2804	15	factor,	factor
2805	2	confer,	confer
2805	3	rights,	rights
2805	5	1950, the	1950, in the
2805	5	Witmar	Witmark

<u>PAGE</u>	<u>LINE(S)</u>	<u>ERROR</u>	<u>CHANGE TO</u>
2805	5	Roselle case	Alden Roselle cases
2805	5	case,	cases--
2805	11	statute	statutory
2805	17	combine the	combine, the
2805	18	validity	validly
2805	18	prescribed	proscribed
2805	23	Addiston Pipe	Addyston Pipe
2806	4	dispute.	dispute it.
2806	5	sellers,	sellers--
2806	21	disadvanta	disadvantage
2807	4	producest	per use system
2808	6	create;	create,
2808	13	case, the	case, "the
2808	18	democratic, political	democratic political
2808	19	institutions, but	institutions. But
2808	19	with	were
2808	21	competition.	competition."
2809	14-15	record but	record. But
2809	18	vhat	what
2809	23	decree, and I	decree, I
2811	2	true, but	true. But
2811	5	fees--the	fees. The
2811	8-9	least. That	least, that
2811	13	it is	as

<u>PAGE</u>	<u>LINE(S)</u>	<u>ERROR</u>	<u>CHANGE TO</u>
2811	14	that	it has
2811	17-18	the competitive	the anticompetitive
2811	21	On point	In point
2812	3	the television	that television
2812	6	conclusion p	conclusion
2812	7	remains a	remains "a
2812	8	owners, using	owners," using
2812	10	conclusory	illusory
2812	22	in marketing	in their market
2813	6	slow	so
2813	15	effect overwhelmingly	effect, overwhelmingly
2814	19	There	"There
2814	20	Music	music
2814	23	music,	music,"
2814	24	without	"[without
2814	25	reduce an offer of an	adduce and offer
2815	3	reduce an	adduce and
2815	3	offer of proof	offer proof
2815	4	practicability,	impracticability],"
2815	6	to not	not to
2815	6	If	"If
2815	7	licenses	licenses,
2815	8	licenses to	licenses, to
2815	8	NBCTN and ABCTN	NBC-TN and ABC-TN

<u>PAGE</u>	<u>LINE(S)</u>	<u>ERROR</u>	<u>CHANGE TO</u>
2815	10	Music,	music
2815	12	NBCTN and ABCTN	NBC-TN and ABC-TN."
2815	25	13 'X", an	13 as
2816	2	unobtainable. That portion in brackets,	unobtainable--that portion,
2816	4	obtained	obtained,
2816	5	practice	practice,
2817	5	experts and	experts, through
2817	6	producers and	producers, through
2817	12	notes	notices
2817	17	stipulation	stipulation,
2818	10	BMI	BMI,
2818	20	diminimize	de minimis
2818	23	deminimizedis	de minimis is
2818	24	law	law,
2819	20	and the canned	in the can
2819	21	and the canned	in the can
2820	2	public	published
2820	12	music	Music
2820	19	canned	can of
2820	20	we will	we should
2821	10	machinery	machinery,
2821	22	here, performance	here, in performance
2821	22	networks, and	networks.
2822	10	the television	if a television
2822	21	network	network,
2822	22	having all	curveballs, with all

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(Nov. 26 cont'd)

<u>PAGE</u>	<u>LINE(S)</u>	<u>ERROR</u>	<u>CHANGE TO</u>
2823	5	does evidence	does the evidence
2823	8	about for	about, for
2823	9	networks the	networks, the
2823	16	sakes? For	sakes for
2823	17	possession	possessing
2823	19	like so	like, so
2823	23	behavior.	behavior?
2824	24	writer	writers
2824	24	publisher	publishers
2824	24	demonstrated	demonstrated that
2825	6	put it	put proof
2825	22	purchaser	publisher
2825	25	where he is	what he has
2826	7	Kelman	Kellman
2826	8	3M.	3M incident.
2826	12	again, and	again--and
2826	14	Who	¶ Who
2826	16-17	¶	not ¶
2826	23	Forth	Forty
2826	24	uses	distributions
2826	25	rights	credits
2827	4	ASCAP--60	ASCAP--with 60

<u>PAGE</u>	<u>LINE(S)</u>	<u>ERROR</u>	<u>CHANGE TO</u>
2828	6	them, and	them. And
2828	6	everyone	every one
2828	9	their fund	their four fund
2828	10	for	through
2828	10	system.	system, but
2828	11	They lose	which they would lose
2828	13	contention	conflict
2828	15	AGAC	AGAC,
2828	16	was in referring	, was referring
2828	16	to the	to in the
2830	15-16	¶	not ¶
2830	19	doctors	doctors'
2830	20	dentists	dentists'
2831	3	with just anbody.	directly with specific publishers.
2831	6	cause free	cost-free
2831	10	an	the
2831	18	rights	credits
2831	22	are the	are the
2832	2	copyrights.	copyrights on the street corner
2832	5	apiece	a piece
2832	8	deposition, put	deposition. To put
2832	10	¶	(Do not indent)
2832	11	rights of	rights part of
2832	11	2/5 of	2/5, or

(Nov. 26 cont'd)

7

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7

<u>PAGE</u>	<u>LINE(S)</u>	<u>ERROR</u>	<u>CHANGE TO</u>
2832	17	formof	form of
2832	18	is more	is slightly more
2833	13	Honor, as	Honor, last May, as
2833	19	injunction.	injunction action.
2833	23	injunctions	injunctive suits
2834	4	to	the
2834	12	lawsuit, since	lawsuit. Since
2835	20	million	middle
2835	21	dollars missing	missing
2835	23	icecream	ice cream
2836	4	Obviouslythe	Obviously the
2836	7	Ira	Aaron
2836	10	relies	realizes
2836	15	SalChiantia	Sal Chiantia
2836	18	milky ways	Milky Ways
2836	21	pays to	pays in
2837	13	word	world
2837	13	non reality	non-reality
2837	18	didn't	did
2838	15	lump	limp
2839	20	and they	and, they
2839	22	Gunsmoke. We	Gunsmoke, we
2840	9-10	ques-/tioned	confess
2840	21-22	that way. ¶ Funny	that way, they responded--funny

<u>PAGE</u>	<u>LINE(S)</u>	<u>ERROR</u>	<u>CHANGE TO</u>
2842	9	piccolo	piccolo
2843	3	rate	ray
2843	12	riding	rising
2844	5	senario	scenario
2844	6	witness	witnesses
2844	8	deposition	depositions
2844	8	exerpts	excerpts
2844	13	presidentcy	presidency
2844	17	Schulman	Shulman
2844	19	given	give
2845	6	Brodio a	Broido, a
2845	9	Copeland	Copland
2845	19	Brodio	Broido
2845	22	Ruben	Rubin
2845	24	us, the	us, until the
2846	2	Ruben	Rubin
2846	13	Heaven	heaven
2846	20	today and what	today who
2847	5	never any	never had any
2847	20	hob goblin	hobgoblin
2847	22	Presston	Preston
2848	12	Charlie for	Charlie, for
2848	13	that and	and that
2850	9	pidgeon	pigeon
2850	15	Sunca	Sunga

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<u>PAGE</u>	<u>LINE(S)</u>	<u>ERROR</u>	<u>CHANGE TO</u>
2851	17	programes	programs
2852	12-13	non-/secquitur	non/sequitur
2852	16	cal	call
2852	17	presumed	resumed
2852	18	wile	while
2852	20	Cross	Cross-
2854	9	collecte	college
2855	2	thelaw	the law
2857	19	pictures.	Pictures
2857	19	produce	produces
2857	21	producer ot	producer
2858	2	paRent	parent
2858	15	hve	have
2859	15	thier	their
2860	6	are produced	are not only produced
2861	3	And	Q And
2861	12	ASCAP	ASCAP performed
2861	14	thatyou	that you
2861	16	That'sour	That's our
2861	18	whre	where
2861	20	Government	government
2862	3	youhave	you have
2863	4	it can't	that it can
2863	7	requested	rephrased

<u>PAGE</u>	<u>LINE(S)</u>	<u>ERROR</u>	<u>CHANGE TO</u>	2995-	10
2864	5	continental	Continental		
2864	9	m ovies	movies		
2864	17	future	feature		
2864	18	features	pictures		
2865	4	from or our	from our		
2865	16	on	of		
2865	23	continental	Continental		
2865	25	composer, a	composer and		
2865	25	O-Sullivan	O'Sullivan		
2866	8	super star	superstar		
2867	6	Number	number		
2868	20	create. Recorded	create, recorded		
2868	24	records	Records		
2869	3	records	Records		
2869	14	gropp	group		
2869	17	night	might		
2869	25	Record	Records		
2870	7	Pickwick. Duchess, Champagne	Pickwick, Duchess, Champion		
2871	8	yousay	you say		
2871	24	Sometimes	Do you sometimes		
2872	13	Champagne	Champion		
2872	15	Champagne	Champion		
2872	20	music. Motion	music -- motion		
2873	23	hage	have		

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<u>PAGE</u>	<u>LINE(S)</u>	<u>ERROR</u>	<u>CHANGE TO</u>
2874	4	company	companies
2874	15	have increased of collections	of collections have increased
2875	25	Association	Association?
2876	18	Can you	Can you
2877	9	Jack, the	Jack the
2877	18	ay	say
2878	9	an	and
2878	22	say of	say, of
2879	?	cases;	cases,
2879	6	agency	Agency
2880	2	copyright act	Copyright Act
2880	3	copyright extension bill	Copyright Extension Bill
2881	10	have been	has been
2882	10	songerwriter's	songwriter's
2882	14	or falling	or falling
2883	6	Proper portion	Per proportion
2884	16	Chiantia, have	Chiantia, have
2886	2	better, your	better, your
2886	5	again.	again?
2887	24	There is	There are
2889	23	can;	can,
2890	11	can music	can, music
2890	14	bill?	proceed?
2892	8	nore	more

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<u>PAGE</u>	<u>LINE(S)</u>	<u>ERROR</u>	<u>CHANGE TO</u>
2892	12	ofthe	of the
2892	14	the Tonight show	The Tonight Show
2892	15	the Tonight show	The Tonight Show
2893	11	he	the
2894	12	where is	where there is
2894	17	witness'	witness's
2894	22	Topkis'	Topkis's
2895	20	hose	those
2896	16	and	an
2897	12	thee	there
2897	17	inthe	in the
2897	20	There	These
2899	18	believe, and	believe, and
2901	3	commentments	commitments
2902	12	him ready, read	him read
2904	10	compositions at	compositions, at
2904	16	CBS License,	the CBS License,
2904	20	I Will	I'll
2904	23	were	was
2905	7	show	Show
2905	19	don'tknow	don't know
2905	11	tha	that
2907	17	acquir	acquire
2908	11	inwhich	in which
2908	12	substantia-	substan-
2908	13	ly	tially
2908	19	wouldn't	wasn't
2909	5	MCA,	MCA?

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<u>PAGE</u>	<u>LINE(S)</u>	<u>ERROR</u>	<u>CHANGE TO</u>
2910	2	whenit	when it
2911	18	hat	that
2912	7	mind, maybe	mind is, maybe,
2912	11	repertory	repertory?
2912	19	youunderstand	you understand
2913	11	Honor.	Honor?
2913	24	whenhe	when he
2914	16	opportuhity	opportunity
2915	4	inhis	in his
2917	9	it.	it?
2918	7	yo u	you
2918	21	busines s	business
2919	5	that.	that?
2919	6	NBC?	NBC.
2920	4	,"	",
2920	17	song,	song
2920	22	Misty has	Misty, which has
2921	14	your approach	you are approached
2921	25	it	it in
2922	3	April;	April,
2926	11	out;	out,
2928	23	hafe	have
2929	2	is very	is a very
2929	7	wat	what
2929	11	w ithdraw	withdraw
2929	16	direct a license	direct license

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<u>PAGE</u>	<u>LINE(S)</u>	<u>ERROR</u>	<u>CHANGE TO</u>
2929	23	conxent	consent
2929	24	Q	A
2930	13	I think	Q I think
2931	7	Honor	Honored
2933	15	Kappel	Chappell
2933	19	members of goods	members
2934	12	that.	that,
2935	12	or	on
2935	17	or	on
2935	21	functions	financials
2936	18	identification;	identification --
2936	19	evidence,	evidence --
2938	4	of	is
2939	20	Kojac	Kojak
2941	7-8	that is broadcast records?	that it is called "broadcast records"?
2941	19	and license	than license
2942	4	there,	there
2942	17	reasonable	is a reasonable
2942	23	doyou	do you
2943	9	with a	for a
2943	11	except that	except for that
2943	14	thatyou	that you
2943	21	ofthe	of the
2944	2	anAGAC	an AGAC
2944	8	had	have
2944	9	contracts, I	contracts--I
2944	9	which-are no	which are not
2944	19	license	licensing

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<u>PAGE</u>	<u>LINE(S)</u>	<u>ERROR</u>	<u>CHANGE TO</u>
2945	10	an d	and
2945	14	wlike	like
2945	17	unequivocal	unequal
2946	9	producer you	producer, you
2946	13	considerab ly	considerably
2948	4	Brettlerwas	Brettler was
2948	4	theBenjamin	the Benjamin
2948	7	L'Union Fait La Force	l'unior fait la force
2948	18	KTN	CTN
2949	10	O'Sullivan.	O'Sullivan
2949	15	hav	have
2949	23	lost	lose
2950	25	think, it	think it
2951	14	picturss	pictures
2952	4	wuld	would
2952	7	Companies that is	Companies, that is,
2952	19	compositoins	compositions
2953	2	talke	talk
2955	21	suddenly	suddenly
2956	10	method	mode
2957	7	q	Q
2957	25	there	their
2958	3	arms'	arms
2960	2	willhave	will have
2960	6	has	have
2960	21	anAGAC	an AGAC

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<u>PAGE</u>	<u>LINE(S)</u>	<u>ERROR</u>	<u>CHANGE TO</u>
2962	12	probable	probably
2967	6	Mr.Chiantia	Mr. Chiantia
2967	20	is -- rather	is, rather
2968	8	other --	other 98% --
2968	14	know it	know that it
2970	21	would,	would.
2975	25	Synchronizztion	Synchronization
2982	15	Mr.Brettler	Mr. Brettler
2983	20	ticularly it	ticularly, it
2984	2	wire	wired
2986	8	Mr.Brettler	Mr. Brettler
2986	12	MR.TOPKIS	MR. TOPKIS
2986	23	Mr.Brettler	Mr. Brettler
2986	24	ARe	Are
2987	3	whethe	whether
2987	11	recallthat	recall that
2987	21	hething	nothing
2987	24	Mr.Arrow	Mr. Arrow
2988	17	Mr.Arrow	Mr. Arrow
2989	8	fact even dead	fact dead
2989	9	Mr.Arrow	Mr. Arrow
2990	23	can 't	can't
2992	17	N ow	Now
2993	6	msut	must
2993	10	Allen	Allan
2993	11	Allen	Allan
2993	22	ownly	only

OFFICE OF THE CLERK

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING  
SYSTEM

: Before:  
: HON. MORRIS E. LASKER,  
: District Judge.

VS.

AMERICAN SOCIETY OF  
COMPOSERS, AUTHORS and  
PUBLISHERS

: 69 Civil 5740

New York, November 27, 1973

STENOGRAHHER'S MINUTES

SOUTHERN DISTRICT COURT REPORTERS  
UNITED STATES COURT HOUSE  
FOLEY SQUARE, N.Y. N.Y. 10007 TELEPHONE: CORTLANDT 7-4589

1  
2  
3 gab

2996

4 Columbia Broadcasting System

5 vs.

6 69 Civil 5740

7 American Society of Composers,  
8 Authors and Publishers

9  
10 New York, New York.  
11 November 27, 1973  
12 10:00 A.M.

13 (Trial resumed.)

14 THE COURT: Good morning everyone.

15  
16 SALVATORE CHIANTIA resumed.

17 CROSS-EXAMINATION (continued)

18 BY MR. HRUSKA:

19 THE COURT: All right, Mr. Hruska.

20 Q Mr. Chiantia, I think we ended off last evening  
21 at a point where we were about to get into this matter of  
22 policing the establishments which had bought the 3M cassette  
23 player and tapes and you had indicated that this was your  
24 concern about dealing directly with 3M as distinguished  
from ASCAP handling the licensing of 3M.

25 I would like to ask you whether you had any  
26 discussions with anybody at ASCAP regarding this matter  
27 of policing?

28 A Yes.

Q Could you tell us with whom did you have those discussions and about what time?

A I had those discussions with Mr. Finkelstein some time after the termination of the initial period of three years. I would have fixed that some time in 1968.

Q Did you have any discussions with anybody at ASCAP prior to your entering into the license with 3M?

A Yes, I did.

Q When was that and with whom?

A That would have been in 1964 some time with Bernie Korman.

Q That discussion followed your initial discussion with Allen Arrow about the 3M offer?

A That's correct.

THE COURT: Will you refresh my recollection as to what Mr. Korman's status was in those days?

THE WITNESS: He was on the legal staff of ASCAP. He is now general counsel.

THE COURT: All right.

Q What did Mr. Korman tell you at that time regarding the matter of policing?

A He didn't say anything about policing at the time, as I recall. Yes, he did. He started out by saying that it was a new use, that it would be a difficult

2 matter to control and -- I am trying to think what else  
3 he might have said. We did go into other things. I  
4 don't remember. I did testify --

5 Q Did he tell you, sir, in so many words that  
6 ASCAP would not, in fact, police the establishments which  
7 had purchased the 3M tape player --

8 A No, he --

9 Q Let me finish the question -- at the conclusion  
10 of the three-year term of the 3M licensing?

11 A No, he did not.

12 Q Is it true then that while you were considering  
13 whether or not you should enter into this transaction with  
14 3M you had no idea whether ASCAP would police or whether  
15 ASCAP would not police those establishments?

16 A Well, I rather thought at the time -- at least  
17 the thought crossed my mind that ASCAP might not police  
18 in those instances where it did not license. I had not  
19 come to any firm conclusion. It was a reasonable likelihood  
20 that they would not police.

21 Q Reasonable likelihood?

22 A Yes.

23 THE COURT: Did you give any thought as to how  
24 the matter could be policed if ASCAP wouldn't do it?  
25

1  
2 THE WITNESS: Well, there was some suggestions  
3 at that time that Minnesota -- we had -- I had discussed  
4 this with Mr. Arrow. Mr. Arrow and Mr. Lindgren had  
5 indicated to me that at the conclusion of the agreement they  
6 might be disposed to police the use of the tapes.

7 THE COURT: 3M itself?

8 THE WITNESS: That's right, sir.

9 THE COURT: Some of this may be hypothetical and  
10 theoretical. Would you have been satisfied that they  
11 were sufficiently motivated to do a good job?

12 THE WITNESS: I think they would have been  
13 sufficiently motivated. It was a question of whether they  
14 could do a good job.

15 THE COURT: All right.

16 Q I take it then at the time you entered into  
17 the 3M transaction you did not know whether ASCAP would  
18 police or whether they would not police?

19 A No, I did not.

20 Q For ASCAP not to police, Mr. Chiantia, would  
21 that mean that ASCAP field men would not go into the estab-  
22 lishments that had purchased the 3M tape player?

23 A No, I don't think it would mean that at all.

24 Q What does the concept of ASCAP refraining from  
25 policing these establishments really mean to you?

I must confess I have some difficulty understand-  
ing it myself.

A Well, if an ASCAP agent, for example, were to go into an establishment that was using a Minnesota Mining machine, he might conclude that the license was granted by someone other than ASCAP since ASCAP had not granted those licenses, in which case he would not necessarily report that to ASCAP.

Q Of course ASCAP field men could be instructed by the ASCAP home office to report all instances they found after a certain period of time of establishments using 3M tapes?

A After what period of time, sir?

THE COURT: Any given period of time.

A It could have been six years.

Q I understand that. Let's say instructions had gone out, wasn't it entirely possible and feasible in your mind that instructions could have been issued by the ASCAP home office to their field men which said, "Field men, whenever you discover the use of a 3M tape player in a commercial establishment after date X, report that back to the home office"?

A Yes, that is feasible.

Q That is feasible?

2 A Yes, sir.

3 Q All right. Were you under the impression that  
4 ASCAP, if it did detect uses, unauthorized uses, post  
5 license term uses of the 3M tape player in commercial  
6 establishments, that ASCAP would refrain from instituting  
7 infringement action against those establishments?

8 A Yes, I understand that because I wanted to see  
9 Mr. Finkelstein to talk about it.

10 Q He told you that ASCAP would not bring such  
11 action?

12 A That's correct.

13 THE COURT: Is that at any time or during the  
14 period of the license?

15 THE WITNESS: At the termination of the agreement,  
16 some time after the initial three-year period. I went to  
17 see Mr. Finkelstein.

18 THE COURT: He said they wouldn't sue even then?

19 THE WITNESS: That is correct, sir.

20 Q Was there any valid reason as far as you know  
21 for ASCAP taking the position that it would not bring  
22 such infringement action against such unauthorized users  
23 of these 3M tape players?

24 THE COURT: I will sustain an objection to  
25 that question.

2                   MR. TOPKIS: You know, your Honor, I wasn't  
3 going to make it. I find it would waste too much time.

4                   THE COURT: Even though I know Mr. Chiantia to  
5 be admitted to the bar, it seems to me that calls for a  
6 legal conclusion, operation of other people's minds and  
7 everything else.

8                   MR. HRUSKA: What I am --

9                   THE COURT: Mr. Finkelstein is going to  
10 be here.

11                  MR. HRUSKA: Your Honor, I think Mr. Chiantia's  
12 state of mind on this is of great importance because --

13                  THE COURT: That may be. That isn't what I  
14 understood you to ask in the last question.

15                  Q         Let me put it this way: In terms of the  
16 question, Mr. Chiantia, as to whether your organization,  
17 ASCAP, should police and institute infringement action, is  
18 there any difference between, on the one hand, a restaurant  
19 playing a phonograph record to its customers and, on the  
20 other hand, a restaurant playing a 3M tape machine to its  
21 customers after that restaurant's license to make public  
22 performances for profit had expired?

23                  MR. TOPKIS: Your Honor, that --

24                  THE COURT: Did I encourage you?

2 MR. TOPKIS; I am afraid so. I really want  
3 to move this along. It is on the record over and over  
4 again. Can't the question be what did Finkelstein say  
5 to you and double it?

6 MR. HRUSKA: That is not the point, your Honor.

7 THE COURT: I will sustain the objection, Mr.  
8 Hruska. To ask Mr. Chiantia what he thinks the difference  
9 between one and the other is, I don't see what it proves.  
10 The question is what do I think between one and the other.

11 MR. HRUSKA: I am trying to establish here, your  
12 Honor, is this point of view which has been expressed by Mr.  
13 Chiantia, his concern about licensing 3M directly and his  
14 statement that he thought it was in the best interests of the  
15 music publishing industry to have ASCAP handle that licensing  
16 was not legitimately valid based on this policing question.  
17 I believe this whole contention regarding the problem of  
18 policing is not a valid contention and I believe, your Honor,  
19 we should be able to explore that, get at Mr. Chiantia's  
20 state of mind and the state of mind of any other witness  
21 who comes forward with that story.

22 THE COURT: I haven't heard any statement on  
23 his part which supports the implication in your question that  
24 he considered that it was less important to police one type

of institution than another.

MR. HRUSKA: That is only a step in the direction that I am trying to go.

THE COURT: Let's not take so many steps. Let's get to the ultimate question.

Q Didn't you believe that this so-called problem of policing ASCAP's inability or desire not to police was totally ridiculous, Mr. Chiantia?

A No, not really, because I can understand ASCAP not wanting to police something it didn't license in the first instance. I assume when you direct license, you also have the responsibility of policing —

Q Mr. —

MR. TOPKIS: May the witness finish his answer.

A If I were to direct license, why would I insist that ASCAP police what I direct licensed?

Q Mr. Chiantia, you direct license a phonograph record company to place one of your songs on that phonograph record company's cassette tape, right?

A I am sorry?

Q I say you issue a direct license to a phonograph record company to enable that phonograph record company without infringement to play one of your songs on its cassette tape?

2 A Yes, sir.

3 MR. TOPKIS: What phonograph record company  
4 are we talking about?

5 MR. HRUSKA: It doesn't make the slightest bit  
6 of difference, your Honor.

7 THE COURT: You mean MCA licenses phonograph  
8 companies?

9 MR. HRUSKA: Yes.

10 MR. TOPKIS: Is that a question of fact or is  
11 it putting a hypothetical?

12 THE COURT: It is a question preparatory to asking  
13 a further question, and the answer to it is yes.

14 Q You licensed 3M Company as we know directly  
15 to put your music on its tapes. What is the difference  
16 in terms of ASCAP --

17 A There is a great deal of difference, if I may.  
18 In the first instance, when I license Columbia Records  
19 to record my song, I merely give them a license to record.  
20 I do not give them a license to perform. That license is  
21 secured by the person who performs the recording. In  
22 the case of Minnesota Mining, I went beyond giving a  
23 mechanical reproduction license and I gave them a license  
24 to perform. There is a great deal of difference, I submit.

2 Q You gave a license to 3M on behalf of  
3 3M customers. Let's take one of those establishments.

4 A Right.

5 Q A restaurant in New York. It gets a three-year  
6 term. During those three years it plays the 3M tape. At  
7 the end of those three years it doesn't have a license, but  
8 it continues to play that 3M tape.

9 A Precisely.

10 Q Do I understand your position to be that at the  
11 end of those three years ASCAP quite properly should not police  
12 that establishment because you issued a performance rights  
13 for the prior three years?

14 A I didn't say quite properly. I can understand  
15 the refusal to license. I did not say quite properly.  
16 I can understand their refusal to license -- to police some-  
17 thing they didn't license.

18 Q Let's take another example. A restaurant in  
19 New York, same restaurant, did not decide to buy a 3M tape  
20 player, decided to put in an ordinary cassette player and  
21 put in a cassette and played that cassette to its customers,  
22 some of the music on that cassette was music out of your  
23 catalog. Do you think ASCAP properly should refrain from  
24 policing that establishment under those circumstances?

2 A I see no reason why --

3 Q What --

4 MR. TOPKIS: May the witness finish his answer?

5 Q "I see no reason."

6 THE COURT: He hadn't finished.

7 A I see no reason why --

8 Q I don't mean to interrupt --

9 THE COURT: But you are interrupting him.

10 MR. HRUSKA: I can barely hear him.

11 THE COURT: Move your stand closer or something.

12 Actually the acoustics while they are not good in this room  
13 are not that bad. I have been here for about six weeks  
14 and other people have made themselves understood.

15 MR. HRUSKA: It may be my fault.

16 A I see no reason why ASCAP would be refrained  
17 from policing that particular use. I did not license it  
18 and it was -- that is a use which ASCAP would police.

19 Q There is a difference in your mind between  
20 those two?

21 A Yes, there is. I did not license that in the  
22 first instance. Minnesota Mining licensed and ASCAP has  
23 every reason to expect that I would have taken whatever  
24 steps are necessary to police that use.

25 Q Did you think there was any difficulty involved

2                   in ASCAP finding these establishments?

3                   A       Not at all. I could have given them a list.

4                   Q       Exactly. 3M did offer to provide ASCAP --

5                   A       Yes, sir.

6                   Q       Let me finish the question. 3M did offer to  
7                   provide ASCAP with a list of all the establishments that  
8                   had bought the 3M cassette player?

9                   A       I don't know whether Minnesota Mining ever  
10                  offered those lists to ASCAP. If ASCAP requested, I could  
11                  have gotten them.

12                  Q       Those lists would have --

13                  THE COURT: I understand it, Mr. Hruska. It  
14                  is as plain as anything.

15                  MR. HRUSKA: There is an additional point, your  
16                  Honor.

17                  Q       -- pinpointed the establishments in terms of when  
18                  their license expires so as to each establishment ASCAP  
19                  would know the date on which that license expired, true?

20                  A       True.

21                  Q       Thank you. Under your license with 3M, 3M  
22                  had an option to renew for another three years, right?

23                  A       Yes, they did.

24                  Q       Did it ever occur to you that 3M might be quite  
25                  willing to extend the term beyond three years to exercise

that option?

A Yes.

Q Did it occur to you that 3M might be particularly willing to exercise that option and extend that term if ASCAP field men visited the 3M installations, the establishments which had bought the 3M tape, and raised some difficulty with those people regarding unauthorized uses?

A I am sorry, I don't understand that question at all.

Q All right. Did it occur to you that in terms of 3M's own business interests, the preservation of its good will in its relationship with its customers, that 3M's interest in renewing the term of the license for an additional three years would be particularly strong if field men of ASCAP were to visit establishments at the end of the three years and raise some problems with those establishments if they didn't have any licenses?

A Just a moment. Do you mean that Minnesota Mining would be anxious for this to happen or not anxious?

Q Anxious to renew the term to preserve its good will with its customers?

A Would it reserve the good will by having ASCAP go in to dun them for money or not to? I don't under-

stand what you are driving at.

Q Let me explain. In one situation Minnesota Mining, let us say hypothetically, does not renew the term, takes the license from you for three years, does not exercise its option to renew for another three years. In those circumstances there would be presumably a lot of establishments out in the country playing 3M cassette players and infringing?

A Infringing on my companies, that is correct.

Q Let's assume that ASCAP field men were or your field men were to visit these establishments and say to the proprietors that they were performing music without licenses and threatening them with lawsuits. That would create, wouldn't it, some problem in 3M's relationship with its customers?

A I don't know how.

THE COURT: Mr. Hruska, it seems to me all this material is material for argument. I don't see that Mr. Chiantia is particularly-- he is a very intelligent sophisticated man. We can all argue what the consequences of these hypothetical situations might be.

MR. HRUSKA: Yes, indeed.

THE COURT: Let me ask this. I don't know whether to put this as a hypothetical or an actual. If

one of the tapes that 3M used and sold which contained your music, if the license for the performance of that music had expired, would you have regarded 3M as the infringer or would you have regarded the person using that tape as the infringer or would you have regarded both of them as infringers?

THE WITNESS: No, sir, I would have regarded the place using that tape as the infringer.

THE COURT: All right.

Q Did you believe --

THE WITNESS: Who bought the tape, your Honor, and bought the machine.

THE COURT: And he was performing it?

THE WITNESS: And he was performing it.

Q Did you consider in 1964 and early 1965 while you were negotiating with 3M the possibility that if ASCAP refrained from policing and instituting infringement actions, the publishers who dealt with 3M might do that on their own?

A Yes, that was a consideration.

Q That was a consideration?

A That was a consideration, yes.

Q Was that a feasible prospect to you?

A I think it would have been feasible providing the return would have justified the expenditure, yes.

Q I would like to come back, Mr. Chiantia, to  
2 your statement that you believe that it was in the best  
3 interest of the music publishing industry that performing  
4 rights be licensed through the societies and particularly  
5 in this case of 3M matter.

A Right.

Q Was there any basis for that conclusion on your  
8 part other than your concern about policing?

A Absolutely not. Absolutely not. ASCAP is  
10 better equipped to do that than I am. That is business that  
11 ASCAP is in. I am not in the business of licensing per-  
12 formances. I am in the business of creating them. I am not  
13 in the business of licensing or policing. Naturally  
14 I am at a disadvantage against ASCAP in licensing and polic-  
15 ing. That is why I would rather they do it. That is why  
16 Harry Fox Agency was formed, to make it easy for publishers  
17 to license and to police.

Q When you learned in 1968, Mr. Chiantia, that  
19 ASCAP had made a deal with 3M on the M1200 series --

A Was it in 1968? I don't remember.

Q Yes, sir.

A All right.

Q -- your reaction to that news was bravo, well  
24 done, right?

2 A Yes.

3 Q Each of those 3M, 1200 tape players contained  
4 1200 songs, is that your understanding?

5 A That is my understanding.

6 Q How many of those 1300 songs were MCA songs?

7 A I don't remember offhand, but we did have a  
8 number of songs in that program.

9 Q But no recollection really about the number?

10 A No, but I can find out for you. I just don't  
11 remember.

12 Q Let me approach it this way: How much money  
13 did MCA receive from AS. P in respect of the 3M, 1200  
14 series?

15 A I have no way of knowing that, sir.

16 Q Do you even know whether you received any  
17 distribution in respect of the M1200 series?

18 A I know I received no distributions with respect  
19 to the 1200 series.

20 Q None whatever?

21 A None whatever.

22 THE COURT: Why is that?

23 THE WITNESS: I asked about that, sir. I was  
24 told by Mr. Marks that the program apparently had not been  
25 terribly successful at least up to 1973, and the returns

had been -- the money they had received was minimal and it hardly justified a separate -- I understand that '73 did produce some revenue and will be distributed in '74.

Q Prior to the acquisition of Leeds, Pickwick, these other publishing companies by MCA -- and as I recall that acquisition was on January 1, 1965, that --

A That's correct.

Q Prior to that time who was the president of Leeds?

A Lou Levy.

Q He was your immediate superior?

A That's correct.

Q He was the chief operating officer of the company?

A The chief executive officer.

Q Chief executive officer?

A I would have been the chief operating officer.

Q Mr. Levy was at that time a member of the ASCAP board?

A Yes, in 1965. I don't remember the exact date that Mr. Levy joined the board of ASCAP. It could have been around 1965 or -- I just don't remember that. He had not been on it a terribly long time.

Q I don't believe there is any dispute about it.

2 Mr. Levy was accordingto the answers to interrogatories,  
3 a member of the ASCAP board in late 1964, and through the  
4 time that the 3M agreement was signed.

5 A Yes, he was at that time.

6 Q Yes. In late '64 and early '65 when you were  
7 negotiating with 3M, Allen Arrow. 3M had made its offer to  
8 you, Mr. Levy clung to the hope that 3M would license  
9 through ASCAP rather than through MCA directly, is that  
10 true?

11 A Now, what are we talking about? Are we talking  
12 about 1964 or '65? There was no MCA in 1964, at least  
13 not with respect to Leeds Music.

14 Q I am sorry, you are quite right. Mr. Levy  
15 clung to that hope vis-a-vis -- let me go back. Let me  
16 repeat the whole thing.

17 May I refer to your music publishing com anies  
18 through this period as Leeds, rather than MCA, so as to  
19 avoid any confusion?

20 A As long as you distinguish whether it was '64  
21 or '65.

22 Q Right. In late '64, that is after October  
23 29 when you first met AllenArrow on this deal, through  
24 January and February of 1965, Mr. Levy clung to the  
25

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Chantia-cross

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hope that 3M would license through ASCAP rather than  
license directly from Leeds?

THE COURT: Is that a question?

MR. HRUSKA: Yes.

Q Is that true?

THE COURT: If you know the answer to it.

A It is partly true and partly not true because  
when I commenced my negotiations with Minnesota Mining,  
I had discussed this with Mr. Levy. Lou Levy indicated  
to me at that time that he thought it was a good idea to  
go ahead with it. That was initially.

2 Q I am sorry. You said in what period of time?

3 A At the time that Mr. Arrow approached me.

4 Q Right.

5 A In the first instance about this deal. I had  
6 discussed it with Lou and some time later, Lou came to the  
7 conclusion that it was a good idea to go into this deal.

8 Q When was that?

9 A Oh, that would have been some time in 1964.

10 Q In '64?

11 A Yes, some time.

12 Q But he still clung to the hope that ASCAP would  
13 come to some arrangement with 3M?

14 A He expressed that to me some time in 1965,  
15 after the acquisition by MCA. That is correct.

16 THE COURT: Was that still during the period in  
17 which you were negotiating with 3M or was it after you concluded  
18 with 3M?

19 A Well, we were still going back and forth. We had  
20 more or less come to an oral understanding as to what the  
21 deal might be but we had not signed any papers and at that  
22 time, in 1965, Mr. Levy still thought it was a good idea  
23 because Mr. Levy was a progressive thinker and he thought we  
24 should encourage new uses.

1 jbbcr 2

Chiantia-cross

2 But at that time you are quite right, at that  
3 time he did cling to the hope that ASCAP would license.

4 Q In other words, to make this clearer, he was willing-  
5 ing to go ahead if ASCAP did not license 3M?

6 A That is correct.

7 Q But he hoped that ASCAP would license 3M and he pre-  
8 fered that?

9 A That is absolutely correct.

10 THE COURT: Is n't that pretty much your point of  
11 view, too?

12 THE WITNESS: Yes, that is, sir.

13 Q Some time after January 1, 1965, Mr. Levy said  
14 to you, did he, "I think ASCAP is going to make a deal;  
15 why don't we hold off and see what happens"?

16 A That is correct.

17 Q Did you ever discuss with Mr. Levy the basis for his  
18 hope?

19 A Well, Mr. Levy got that information somewhere.  
20 I don't remember --

21 THE COURT: It seems to me we are getting  
22 into pretty far removed hearsay which might be quite appropri-  
23 ate on depositions but it is of doubtful value at this stage  
24 of the proceeding.

25 Q In 1965, after the acquisition, Mr. Adams, who was

1 jbbcr 3

Chiantia-cross

2 corporate vice president of MCA took over general respons-  
3 sibility for music publishing and other areas for  
4 MCA, true?

5 A That is correct, sir.

6 Q And you reported to Mr. Adams?

7 A Yes, I did.

8 Q And you discussed the 3M offer with Mr. Adams?

9 A Yes. I told him about it, yes.

10 Q And Mr. Adams said to you, did he, "If it is  
11 possible that ASCAP could license, I prefer that they do it"?

12 A Yes.

13 Q And you agreed with that view?

14 A Yes, I did.

15 Q Your response to Adams was that you didn't think  
16 that ASCAP was going to license?

17 A That is correct.

18 Q Now, there was an ASCAP board meeting in January  
19 of 1965.

20 Do you recall, sir, that it was on that date that you  
21 signed copies of the MCA-3M agreement and sent them to  
22 Allen Arrow?

23 A No, I don't recall that.

24 Q I would like to try to refresh your  
25 recollection.

2 MR. TOPKIS: Does it make the slightest dif-  
3 ference?

4 THE COURT: What difference does it make?

5 MR. HRUSKA: I believe it does, your Honor. I  
6 am trying to think how to explain this without disclosing  
7 too much of the next few questions but there was an incident  
8 which occurred --

9 THE COURT: Let me suggest that we discuss it  
10 in the robing room, so you don't bother the witness but  
11 I also would like to discuss the whole matter.

12 (In the robing room, counsel and Court present:)

13 THE COURT: I take this opportunity to call you in  
14 the robing room because I have the feeling and reaction  
15 that you may be developing the 3M incident in more detail than  
16 is necessary.

17 We have already developed it in a good bit of  
18 detail in your case.

19 I thoroughly understand what it is all about  
20 and I don't know that the outlines of the picture are going to  
21 become much sharper by a great deal of further questioning  
22 of the defendant's witnesses.

23 It seems to me that the position of Mr. Chiantia,  
24 both for himself and as an officer of Leeds and MCA  
25 is, quite frankly, that they would have preferred, all of

1                   jbb 5                   Chiantia-cross  
2 them connected with that company, to see ASCAP do the job  
3 but if ASCAP wasn't going to do the job, they weren't going  
4 to let this opportunity pass by as, indeed, they didn't.

5                   I don't know how much more can come out of it than  
6 that. I don't know what the particular question is. We really  
7 do have to move along and I just want you to understand how I  
8 look at the thing.

9                   MR. HRUSKA: I do understand that very much,  
10 your Honor, and I am obviously very sympathetic to it. I am  
11 somewhat frustrated in that I know that this particular  
12 company's reaction to the 3M matter was really a great deal  
13 more emotional, the feeling went very deep.

14                  What I want to bring out is an incident on the  
15 ASCAP board where Lou Levy told the ASCAP board  
16 on the same day that Mr. Chiantia had sent the signed copies  
17 of the agreements to Arrow, Lou Levy said to the ASCAP  
18 board, "We will not go ahead with this deal".

19                  Then there was a major confrontation between  
20 Chiantia and Levy on this with Adams. Adams felt it necessary  
21 to go see Allen Arrow about it.

22                  Arrow said that Chiantia was very embarrassed by the  
23 whole thing, so much so that Arrow offered to return the  
24 signed contracts to Chiantia so as to not embarrass him, and  
25 all this simply to indicate the great depth of feeling on the

2 matter.

3 Now, there is evidence in the record about  
4 it already and --

5 THE COURT: Are you willing to stipulate to those  
6 facts?

7 MR. TOPKIS: No, because I don't have to.

8 THE COURT: I didn't mean you did.

9 MR. TOPKIS: It is all in the record already.  
10 Chiantia's deposition was fully taken and was read into  
11 the record by these people. They are now just taking  
12 him through the same stuff overagain and there is no dispute  
13 about it.

14 THE COURT: Never mind them. They are taking me  
15 through it all over again.

16 MR. HRUSKA: What I tried to do, obviously, is to  
17 cross examine, bring out that Mr. Chiantia's feelings  
18 about this were not simply that he preferred ASCAP to do the  
19 licensing but that he recognized the domino effect here;  
20 he recognized the problem.

21 THE COURT: You could ask him direct questions  
22 to that effect, if you want to establish it. Maybe such  
23 information as you have available to you is useful to  
24 questioning him if his answers are inconsistent with what you  
25 are looking for but I must say in all candor that the depth of

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Chiantia-cross

their feeling on the subject seems to me to be of marginal probative value. I mean either they felt and acted a certain way or they didn't feel and act a certain way and I don't doubt that they had strong feelings on this subject. Everybody in the industry apparently had fairly pronounced convictions about it. It was one of those sort of critical issues at the time. I am prepared to believe that, and indeed Mr. Chiantia has quite clear convictions about it at the moment so I really don't feel it needs to be pressed.

MR. HRUSKA: All right.

There are two other matters. I will jump through what I explained.

THE COURT: I will have to say from hereon in, because my obligations to the public to conclude this trial, both for your interests and other people's interests as much as anything, I will have to ask all of you to consider whether what you are trying to establish is of central significance or only marginal significance and if it is marginal, see if there is not some other way to do it, by asking for a stipulation or making an offer of proof and seeing whether I really think it is going to be worth the time involved or not.

MR. HRUSKA: All right.

(In open court:)

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2 Chiantia-cross

3 BY MR. HRUSKA:

4 Q I would like to jump to another conversation you  
had with Mr. Bregman regarding the 3M matter.

5 Do you recall that, Mr. Chiantia?

6 A Yes, I do.

7 Q And Bregman got very emotional about it.

8 THE COURT: Who is Mr. Bregman?

9 THE WITNESS: He was a publisher.

10 Q And Mr. Bregman got very emotional about the  
11 direct licensing of 3M?

12 A Yes.

13 Q And he said "It was a mistake to leave ASCAP and  
14 license on our own" and he asked where was it going to  
15 stop -- "If you licensed thi individually, you have to li-  
16 cense everything else individually"?

17 A Yes.

18 Q You did not agree that that sort of an analysis  
19 was applicable to the direct licensing of 3M, did you?

20 A That is correct.

21 Q You didn't anticipate that sort of domino effect  
22 which Mr. Bregman feared?

23 MR. TOPKIS: What domino effect?

24 MR. HRUSKA: If you have to license this  
25 individually, you are going to have to license everything.

A NO. I didn't think so. I have already testified  
4 that I would never want to get into licensing -- I think  
5 I said hot dog stands at that point.

6 Q Right.

7 Have you finished?

8 A Yes.

9 Q Now I would like you to assume a CTN bypass, namely,  
10 CBS Television Network --

11 THE COURT: We are going to aidferent subject  
12 now, right?

13 MR. HRUSKA: Yes, your Honor.

14 Q CBS Television Network cancels its ASCAP license,  
15 ABC and NBC retain theirs and CTN is attempting to license  
16 directly.

17 Now, in that situation, if you were asked by CTN  
18 for direct licenses, would you then have to think about  
19 where direct licensing would lead? Specifically, whether  
20 it would have the sort of domino effect that Mr. Bregman was  
21 concerned the direct licensing of 3M would have?

22 A Well, that was Mr. Bregman's concern, not my con-  
23 cern.

24 Q I understand.

25 Would you have a comparable concern if you were

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2 presented with the question not of licensing 3M but of  
3 licensing the CBS Television Network in a bypass?

4 MR.TOKPIS Can't we just have a question about  
5 what Mr. Chaintia felt, not whether he felt as Mr. Bregman  
6 did or comparable to what Mr. Bregman might have or whatever?

7 THE COURT: I don't suppose Mr. Chaintia had any  
8 feeling about the set of facts that has just been posed because  
9 that wasn't the set of facts back then.

10 But you are now asking, aside from all of that,  
11 and let me be sure I understand the question, too -- are you  
12 assuming cancellation by CTN of its ASCAP license and the  
13 retention by NBC and ABC?

14 MR. HRUSKA: Of their ASCAP licenses, yes, your  
15 Honor.

16 THE COURT: And you are asking Mr. Chaintia  
17 if he would be concerned about direct licensing of CTN under  
18 such circumstances?

19 MR. HRUSKA: More specifically, your Honor, whether  
20 he would be concerned about a domino effect as to where the  
21 direct licensing of CTN would lead in terms of other users  
22 commencing to directly license.

23 A No, I would not be concerned.

24 Q You would not be concerned about that?

25 A No, not if you are talking about the three

2 television networks.

3 Q Wouldn't you have to know when you were approached  
4 by CTN under the circumstances what other possibilities were  
5 involved, what other doors would be opened?

6 MR. TOPKIS: That is so vague that I don't imagine --

7 THE COURT: Do you understand the question?

8 THE WITNESS: No, I don't, sir.

9 THE COURT: Do you want to suggest what  
10 doors you are talking about?

11 MR. HRUSKA: Yes. I am about to.

12 Q Would you wonder whether you would then have to  
13 start licensing roller skating rinks directly, whether you  
14 would have to then start licensing nightclubs directly,  
15 whether you would then have to start licensing Joe's hot dog  
16 stand directly?

17 A Well, I take it that when CBS goes into a direct  
18 licensing scheme, it does so in a condition where it is  
19 going to be willing to negotiate and I am going to be willing  
20 to negotiate and I am sure that that is the case and I am sure  
21 that if all the hog dog stands -- and by the way, they are  
22 not licensed, I was merely being facetious at that point.

23 Q Metaphorical?

24 A That's right. But if every nightclub and ballroom  
25 and every cabaret insisted on direct licensing, I would come

2 to the Court and ask for some relief because I couldn't  
3 possibly license all these people directly. I just couldn't  
4 do it.

5 Q But when you were approached by CTN or if you were  
6 in the circumstances we just described, you would be con-  
7 cerned that if you and other publishers licensed CTN  
8 directly that direct licensing might spread to an extent that  
9 you would be placed in this unfortunate position?

10 A That would be my problem, wouldn't it? That would  
11 be my problem, wouldn't it?

12 THE COURT: Yes, you mean that would be your  
13 problem in the sense that it would be your problem, rather  
14 than Mr. Hruska's problem?

15 THE WITNESS: No, it would be my problem to  
16 contend with it at the time, yes. There is a possibility.

17 THE COURT: You mean that when any direct licensing  
18 of a major proportion takes effect, it has the inherent  
19 possibility that other people may also ask for direct licen-  
20 sing?

21 A I think that is reasonable to assume.

22 Q And this would be a matter of concern to you?

23 A Yes, it would be a matter of concern. But I wouldn't  
24 refuse to license.

25 Q You would also want to be sure that direct

2 licensing wasn't being used as a wedge for CBS to get  
3 exactly what it wanted from ASCAP, is that true?

4 A Just a moment. You are taking that out of con-  
5 text. Would you give me the whole context in which it was  
6 stated?

7 Q Very happily.

8 MR.TOPKIS: If I may, your Honor, Mr. Hruska is  
9 now exercising his undoubted right to cross examination  
10 by confronting the witness with his prior testimony but the  
11 prior testimony is already all in the record before your  
12 Honor. It has all be introduced by CBS as part of  
13 plaintiff's case, so what in the name of heaven do we gain by  
14 confronting Mr. Chiantia, who is quite familiar with his  
15 deposition and having him and Mr. Hruska argue with each  
16 other?

17 THE COURT: Well, what will I learn by another  
18 round of questioning if the deposition itself is in evi-  
19 dence?

20 MR. HRUSKA: Well, obviously, your Honor, I would  
21 to use this testimony which is in evidence to have the  
22 witness admit what I believe the witness knows and I believe  
23 the witness is very concerned about and that is, specifically,  
24 your Honor, that in the direct licensing of 3M this witness  
25 and other major music publishers certainly would be

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4 extremely concerned about the necessity to have to engage  
5 in price competition and that is a major factor in their  
6 decision.  
7

8       The witness has stated many things on direct  
9 examination, quite naturally of a self-serving nature.  
10 I would like to probe that and I would like to get to the  
11 bottom of it and the best way I know of doing that is to use  
12 statements that the witness has already made in depositions  
13 and to take the logic of that and --  
14

15       THE COURT: That is perfectly all right. I don't  
16 quite understand why I am expected to read his deposition  
17 in full if we are also hearing a trial on it. I am going  
18 to do one or the other. I am not going to read everything  
19 this man ever said.

20       MR. HRUSKA: Right. Well, your Honor, this is a case  
21 where I think you could read the deposition and come to the  
22 conclusion, logically, on your own.

23       I think it is also a situation --  
24

25       THE COURT: Well, I am going to do one or the  
other, Mr. Hruska. I will read the deposition, if you think  
I can come to the conclusion, or I will listen to the testi-  
mony, if you think you can get the admissions that you want but  
recognizing the importance of this case, I am not going to  
duplicate the testimony of witnesses.

2 MR. HRUSKA: Well, obviously, your Honor, it is  
3 alway a little clearer if the witness were to draw that  
4 logical conclusion on his own and freely admit it. I have  
5 got to recognize --

6 THE COURT: No, you are perfectly free to cross  
7 examine him and try and get some admissions but I am only  
8 pointing out that there is a limit as to the amount of time  
9 and energy that a Judge can devote to a case and I think it  
10 is unreasonable to expect me both to read the depositions in  
11 full and also to go all over, when the time comes, the open  
12 court testimony, except to the extent that there are any  
13 inconsistencies, of course.

14 MR. HRUSKA: Then I think particularly in the  
15 light of the discussion, I will turn to one last aspect of the  
16 3M matter that concerns 3XPM49. This document has not been  
17 in evidence, your Honor.

18 I take it your Honor does not want to see it  
19 until it is put in evidence.

20 THE COURT: In general, yes, that is correct.

21 Q Could I ask you to read that document, Mr. Chiantia?

22 A I am reading it now.

2  
3 MR. TOPKIS: Is this going to be offered? If  
so, I object to it.

4  
5 MR. HRUSKA: It hasn't been offered yet, your  
Honor.

6 THE COURT: Do you propose to offer it if you can?

7 MR. HRUSKA: If I can. If Mr. Chiantia can make  
statements which would be a proper foundation for the intro-  
duction of the document.

8 MR. TOPKIS: It is a letter from Allen Arrow to  
9 Lindgren of 3M. Allen was here as part of Mr. Hruska's  
case. Why in the name of heaven --

10 THE COURT: The question is whether this witness  
11 is competent to support its introduction. I am skeptical  
12 that he will be.

13 MR. TOPKIS: It is stipulated that Allen wrote  
14 it and Lindgren got it.

15 THE COURT: Let's see what is going to be asked  
about it.

16 Q This document concerns a --

17 THE COURT: Look, let's just ask him what he  
18 knows about it.

19 Q Did you attend the meeting referred to in this  
20 document?

21 MR. TOPKIS: What meeting?

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A It refers to a meeting. I believe he says a luncheon meeting. Is that correct?

THE COURT: If your theory, Mr. Hruska, is that if Mr. Chiantia did attend the meeting, that then the letter can somehow go in evidence, I wouldn't agree.

MR. TOPKIS: The letter doesn't refer to a meeting

MR. HRUSKA: Let me withdraw that question.

Q Did you have any conversations with Allen Arrow regarding any subject referred to in this letter?

A That is a very broad question, but I take it that you are zeroing in on the disloyalty part. I never had any conversations with Allen concerning disloyalty. Nobody ever accused me of being disloyal. I don't think I was disloyal. If I am anticipating your questions, I apologize.

Q Did you have any conversation with Allen Arrow or with any publisher regarding publishers' interest in not having this proposed luncheon attended by the press?

A I don't remember that at all. I don't remember.

Q I would like to see if I can refresh your recollection.

A Please.

Q At page -- starting at Page 275 of the Allen

2 Arrow deposition --

3 MISS KEARSE: The Allen Arrow deposition is not  
4 in evidence.

5 THE COURT: I think he can bring whatever he  
6 wants to the attention of the witness.

7 MISS KEARSE: I don't think he is allowed  
8 to read it into the record.

9 THE COURT: You can show him the deposition  
10 and ask him if it refreshes his recollection.

11 MR. TOPKIS: May I rise to object on the grounds  
12 of relevance.

13 THE COURT: Let's ask Mr. Hruska to make an offer  
14 of proof.

15 MR. HRUSKA: The offer of proof is that Mr.  
16 Arrow indicated that he had talked with you and Mr. Brettler  
17 regarding this proposed meeting and the feeling on the part  
18 of some publishers that they did not want the meeting  
19 attended by the press. Does that in any way refresh  
20 your recollection --

21 THE COURT: You are asking the question rather  
22 than making the offer.

23 MR. HRUSKA: The offer of proof is that this is  
24 what Arrow said, that he had this discussion.

25 THE COURT: Has Mr. Arrow testified to this

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effect -- has he testified on this subject? I don't recall offhand.

MR. HRUSKA: Not at the trial.

THE COURT: Was he questioned?

MR. HRUSKA: He was.

THE COURT: Are you trying to prove what he said wasn't true?

MR. HRUSKA: I am trying to prove what he said was true.

THE COURT: Is it denied? Is it an issue?

MR. TOPKIS: The question was whether the press should attend a luncheon celebrating --

THE COURT: Does anybody dispute that?

MR. HRUSKA: I believe so.

THE COURT: Who disputes it?

MR. HRUSKA: I believe that when we offered this document during -- yes, we did have questions asked Mr. Arrow about the document. Those questions were objected to and the document was objected to on the ground that Mr. Arrow could not identify the names of the publishers who made the specific statement to him regarding their unwillingness to have the press attend the luncheon because of -- okay.

2  
3 THE COURT: If what you are trying to do is  
4 get in the document, is that what you are trying to do?

5 MR. HRUSKA: Yes.

6 THE COURT: Why don't you ask what this man  
7 knows about the document? You can't get it in if he  
8 remembers why he went to lunch that day.

9 MR. HRUSKA: The only way I can get it in under  
10 your Honor's prior rulings is if Mr. Chiantia knows the  
11 names of the publishers who said this.

12 THE COURT: Why don't you ask him in so many  
13 words if he knows.

14 Q Do you?

15 A No, I don't. If Mr. Arrow to whom this was  
16 communicated doesn't know, how would I know?

17 THE COURT: Let's not spend time trying to figure  
18 that out either. But you don't?

19 THE WITNESS: No, I don't.

20 Q Do you recall, Mr. Chiantia, the letter sent to  
21 ASCAP by Mr. Wood, the president of CBS Television Network  
22 on December 19, 1969?

23 A Yes. There was some reference to it in my  
24 pretrial testimony.

25 Q And that idea -- excuse me, that letter gave you  
the idea that CBS wanted a departure from the ASCAP blanket

system?

A Yes. Generally.

Q Mr. Finkelstein discussed that letter with you and other ASCAP board members prior to Mr. Finkelstein's responding to the letter, is that true?

A I don't --

MR. TOPKIS: Well, I think that is privileged. For all I know I have waived the privilege at some point or other. It is not terribly important. Go ahead. I would rather that my waiver not be taken to be a commitment.

THE COURT: Let's get this straight. It is of some importance. Are you saying that you are agreeable to waiving the privilege for this question but not indefinitely?

MR. TOPKIS: Exactly.

THE COURT: All right.

A I am sorry. Will you repeat the question?

Q Did Mr. Finkelstein discuss Mr. Wood's letter with you prior to Mr. Finkelstein's responding to the Wood letter?

A I don't remember at what point he discussed that. I do remember talking to Mr. Finkelstein about the letter. I am not exactly clear when that discussion took place. It may have been some time before he replied to it. It may have been some time after he replied to it. I don't

remember. The letter did come up and the reply did come up at some point.

Q There was an ASCAP board meeting at which the subject of the CBS request came up?

A If I recall correctly, and I am going from memory and correct me if I am wrong, that letter from Mr. Finkelstein indicated that the subject matter of Mr. Wood's letter would be discussed at a subsequent board meeting.

Is that correct?

Q Yes.

A Okay.

Q Now, this idea --

THE COURT: I am not quite clear. Are you saying only that you remember you got a notice saying it would come up or you remember it did come up?

THE WITNESS: I remember the letter said it would come up at a subsequent board meeting.

THE COURT: In spite of recollection that letter came to you, you don't remember it actually came up?

THE WITNESS: I don't remember whether it actually did come up, your Honor. And I will make that very clear so to save a lot of time and trouble. That board meeting to which that letter referred was a board meeting which I did not attend. I generally do not attend

2 the January board meetings because at that time of the  
3 year I attend MIDEM, which is an international conference  
4 of publishers and record companies in Cannes. That takes  
5 place every January and I generally miss the January meeting.

6 Q But you have been at board meetings and meetings  
7 of the law committee, have you, where the subject matter  
8 of a per use license for CBS came up?

9 A Yes.

10 Q In broad terms, you understood during the course  
11 of those meetings the difference between licensing on a  
12 blanket system and a license under which specific payments  
13 are made for specific uses?

14 A In the broadest general terms, yes.

15 Q Was there any discussion at any meeting of the  
16 ASCAP board or the ASCAP law committee that you attended in  
17 which a suggestion was made that some attempt might be  
18 made to explore the possibility of granting CBS such a  
19 license?

20 MR. TOPKIS: I object to that question, your  
21 Honor. The record is as follows: CBS wrote a letter on  
22 December 19 and sued us on December 31. There was no board  
23 meeting in between. Any subsequent board meeting or law  
24 committee meeting which Mr. Chiantia may have attended would  
25

have been a meeting held by ASCAP functionaries in the course of defending an ongoing litigation. I have never before heard it suggested that an adversary is entitled to probe into how the defendant was thinking of defending a lawsuit.

THE COURT: I am not sure about that. I haven't had the question, but if counsel had been at the meeting --

MR. TOPKIS: May I inquire on the voir dire, your Honor, two questions?

THE COURT: If the directors or the members of the committee were just sitting around talking about it, I am not at all sure he would be entitled to inquire.

MR. TOPKIS: Two questions on the voir dire. Have you ever attended since 1965 an ASCAP board meeting at which counsel was not present?

THE WITNESS: No.

MR. TOPKIS: Have you ever attended a meeting of the ASCAP law committee since 1965 at which ASCAP's counsel was not present?

THE WITNESS: No.

MR. TOPKIS: I rest my case.

THE COURT: I think that is quite significant. That is the item that I mentioned. I would like to know a little more, though.

At the meeting at which CBS request for per use license was being discussed -- no, I think I will leave it up to Mr. Hruska. As of this moment I will sustain the objection.

Q Putting to one side any legal advice or requests for legal advice which was made by any board member of ASCAP counsel, is any suggestion made by any ASCAP board member on a business basis that, you know, maybe we ought to explore the possibility with CBS working out some per use arrangement?

MR. TOPKIS: Your Honor, I press my objection. Am I going to be entitled to ask to bring every CBS functionary in and ask have you ever thought of settling the ASCAP case?

THE COURT: You may or may not. I am concerned if you are talking about what went on at the meeting itself. I don't see how it is going to be possible for me to separate out what counsel was involved in and what counsel wasn't involved in, or what was a business proposition, a business suggestion, and what was not -- a legal suggestion.

MR. HRUSKA: I would submit, your Honor, respectfully, that if there had been a suggestion made by somebody on the ASCAP board, that an attempt should be made to work

out a per use arrangement with CBS, that that sort of suggestion would not be privileged, would not be --

THE COURT: I don't see how you can be so sure of that. Suppose somebody suggested having in mind the fact that it would cool the litigation. It was a defensive ploy --

MR. HRUSKA: I am trying to put it on a business basis.

THE COURT: I don't suppose the directors sat around and said, I am making that suggestion on a business basis and this on a legal basis, did they?

THE WITNESS: I don't remember that.

Q Have you ever had --

THE WITNESS: There was a lawsuit. Everything we did at that point, we were taking guidance from our counsel. We were sued. It was not a case where negotiations were still --

THE COURT: I am quite aware of that.

THE WITNESS: It was not a case where negotiations were still open. The lawsuit had been brought.

Q Was there any decision that was made by the ASCAP board, specific decision to defend this lawsuit?

A Well, I would assume they made that decision

at some point or another.

THE COURT: But you don't recall?

THE WITNESS: I don't recall when we made that decision, your Honor, but certainly if we were sued, we would have defended.

Q Do you recall specifically that the matter was not raised for a vote or can you recall specifically that it was raised for a vote?

THE COURT: I don't think that the important thing is what Mr. Chiantia recalls. I think you might have a right to ask for the minutes.

MR. HRUSKA: We have, your Honor, and the minutes do not reflect such a vote.

THE COURT: Do you recall a specific vote on the matter?

THE WITNESS: No, I don't, your Honor. I don't.

Q Your company, MCA, Mr. Chiantia, is a defendant in the case. Has any decision ever been made by the MCA board to defend this lawsuit?

A I am not -- do you want to object?

MR. TOPKIS: I will object. What relevance does that have. MCA did have counsel here at the first day of

the trial. They noted their appearance. I imagine that was an action taken properly --

THE COURT: I am not sure what relevance it has. If it has relevance, I am entitled to know. If it doesn't have relevance, it will hurt nobody. What do you consider the relevance of whether a particular board of directors of a particular defendant has formally voted to handle the litigation in one way or another?

MR. HRUSKA: What we are attempting to show, your Honor, in this case through Mr. Chiantia and other evidence is that, (1), the idea of a use as opposed to a blanket license is a very old concept, not novel at all.

THE COURT: It must be easier to answer me as to what difference it makes what the board did.

MR. HRUSKA: It is part of the point that it was so obvious to every member of the ASCAP board that they would resist with every asset at their disposal that they didn't have to discuss it, your Honor.

THE COURT: Mr. Hruska, I can see you can argue that, but it also seems to me that when that complaint was slapped on Mr. Finkelstein's desk, as it was slapped on my desk, as a rule 2 Judge, I would have thought to myself something has to be done about this. It doesn't necessarily prove very much that the board of directors didn't memorialize it.

2 MR. HRUSKA: One of the things that could have  
3 been done about it was for ASCAP to approach CBS and say,  
4 let's see if we can work out an arrangement.

5 THE COURT: Sure. I am only responding to your  
6 theory that the formality of the action indicates one thing  
7 or another. In any event, let's get in the facts about  
8 MCA. Do you know whether MCA board voted on the subject?

9 THE WITNESS: It was not brought to the board's  
10 attention, so far as I know.

12 MR. TOPKIS: Could I invite a stipulation that  
13 the CBS board didn't authorize the filing of the suit,  
14 which is the fact.

15 MR. HRUSKA: That is irrelevant.

16 MR. TOPKIS: I so stipulate.

17 THE COURT: Let's move along. MCA didn't  
18 talk about it at the board.

19 THE WITNESS: Not that I am aware of. I am not  
20 a member of the board.

21 Q Do your music publishing companies have a board  
22 of directors?

23 A No, they do not. If we do, it is purely a  
24 formality. The board never meets.

2 Q Mr. Chiantia, do you recall having attended  
3 the ASCAP West Coast meeting in March of 1973?

4 A I did not attend that meeting.

5 Q Yesterday in your direct examination, you gave  
6 testimony regarding the subject of music in the can.

7 A Yes.

8 Q Am I correct in assuming, Mr. Chiantia, that  
9 you do not deny the proposition that when music has been  
10 recorded in a television program and it suddenly occurs  
11 that the network does not have an ASCAP license, that that  
12 situation gives additional bargaining power to the owner  
13 of the copyright?

14 A I don't agree with that at all.

15 Q Whether the owner uses the bargaining power or  
16 not, he has it, don't you agree with that?

17 A No. As a practical --

18 MR. TOPKIS: Assuming it is an ASCAP composition  
19 and there are other objections to the question. Can't we  
20 just get a direct question, your Honor.

21 THE COURT: I thought that was a direct question  
22 and the answer was he doesn't agree with it. So let's go  
23 on.

24 Q And you don't agree with it because you believe

that you personally would not attempt to take advantage of the situation, was that your testimony on this?

A Well, I know that I would not personally take --

THE COURT: My understanding of the witness' testimony on this subject yesterday was that he didn't believe that the situation you described gave extra leverage to the licensor because the licensor had to continue to do business with the people he was licensing and if he took advantage of them once, he would get it back some other time.

THE WITNESS: That is absolutely correct. That was my testimony.

Q Now, of course, if you discover that other publishers were charging -- were using, utilizing this bargaining power, then you wouldn't have any concern, would you, about the prospect of utilizing that bargaining power yourself?

A You mean because other people steal, I should steal. If other people kill, I should kill.

Q You regard it as stealing?

A I regard it as taking unfair advantage. I don't regard it as stealing.

Q You said at Page 2895 of your transcript at Line 13, "Very often a theatrical motion picture will be made and the song recorded and the synchronization license

is subsequently sought. In those cases, speaking for  
MCA, we have never held up anybody. We have never been un-  
reasonable. We have licensed."

Can you recall any specific occasion of the type  
you described in that testimony?

A Well, there was a very recent case. Motion  
picture called Lady Sings the Blues -- can you hear me?

Q Yes, I can.

A Which was a biographical account of the life of  
Billie Holliday. We were very fortunate. We had about  
six or seven songs in that picture and the fees ranged anywhere  
from three thousand up to \$11,000. At one point they asked  
for permission to use Lover Man, a composition which is in  
our repertoire. A song which was identified with Billie  
Holliday as were the other songs in the picture. We were  
having some trouble getting a license from the writers of that  
song.

They were being very difficult. I explained  
this, at least I didn't, but somebody in my office explained  
this to the producer and he said, well, if you think you  
are going to be able to make a deal and we said we think  
somewhere along the line we will be able to make a deal.

They went ahead and recorded it. The writers,

because they happen to be two very crazy people, please don't quote that, one lives in Paris and one lives some place else, very difficult people indeed, refused to license and ultimately they came to us with virtually an ultimatum and they said unless we get \$7500 we will not license. We will not permit you to license. The net result of that was that we licensed for \$11,000 taking into account there is a third writer who had given us permission and we netted out ~~of~~ that whole deal about \$2000 when we should have netted half.

There is a case where we could have held up the producer, but we did not.

Q Can you think of any other situations?

THE COURT: What was the name of that movie again?

THE WITNESS: Lady Sings the Blues.

Q Can you think of any other instances?

A Oh, it happens. I just can't think -- I know that one because it happened in the last year or so, but there have been other occasions. For example, we have a television show called The Dating Game. That was an afternoon show.

Q We are talking about movies.

A I am sorry.

a businessman that if you couldn't agree with RCA on the price, that RCA could substitute an Ella Fitzgerald recording of Misty, let's assume?

A Yes, I understand that.

Q Take the other assumption, another assumption, which is that CBS has in its repertoire an old MGM movie with a night club scene in which Ella Fitzgerald sang April. And that CBS had paid a half a million dollars for two runs of that movie and it had one run left and CTN canceled its ASCAP license and came to you for a license to use that song.

Do you believe that your bargaining power vis-a-vis CTN in that second example is the same as your bargaining power with respect to --

A A record that wasn't made?

Q The record in that first example.

THE WITNESS: Your Honor, I am having difficulty. I think I have answered this question three or four times. I am going to say again for the last time, if your Honor will permit, that it would be suicide for any publisher to refuse to license or to be difficult in a case like that. He will be committing what we used to call commercial suicide. There are kooks everywhere. There are one or two publishers that would probably do it but don't paint us all

with the same brush. It would be suicide.

Q Mr. Chiantia, all I am trying to get at now --

THE COURT: Mr. Hruska, I believe we are getting nowhere. You are perfectly free to argue and if you are right it is going to be true regardless of what Mr. Chiantia thinks that MCA's bargaining power would be greater in the latter situation than in the former. I don't think Mr. Chiantia's answer denies that or attempts to deny it. He simply says as far as he is concerned that consideration is irrelevant. I think also some time or other somebody has got to raise the question of the extent to which even with increased bargaining power MCA could do anything about it.

Suppose you decided you wanted to do something about it, what would be the worst you could do?

THE WITNESS: In that particular situation? The worst I could do is raise the price.

THE COURT: Suppose they refused to pay?

THE WITNESS: If the normal price, take a round figure say --

Q You talked yesterday about distributions of four or \$500 for the publisher and for the writer. Say it is a thousand dollars.

THE COURT: You could raise the price let's say to

2 three thousand --

3 THE WITNESS: You are making an assumption  
4 that I don't necessarily make with you. You are assuming  
5 I am going to charge you the same rates when I direct  
6 license you when I charge on on a blanket license. That  
7 is a wrong assumption. I see no reason why you can make  
8 that assumption. You said a thousand dollars-- you testi-  
9 fied yesterday --

10 MR. HRUSKA: I haven't testified at all, Mr.  
11 Chiantia.

12 THE COURT: Mr. Chiantia, whether Mr. Hruska  
13 intended it or not, let's put that aside, although my  
14 guess is he simply used the figure without thinking about the  
15 difference between direct licensing and blanket licensing.  
16 Nobody is stating, and this lawsuit has nothing to do with  
17 the question of whether you will be able to charge more  
18 for direct licensing if you ever come to direct licensing,  
19 than you would charge on a blanket basis.

20 What I would like to know is this. Maybe it  
21 is for the lawyers to answer: Let us assume that on what  
22 ever basis we are talking about that the price would be  
23 a thousand dollars, the fair price, but you decided, he  
24 is in a pickle, I am going to charge him \$3000. He comes

back to you and says, "I am sorry, I am not going to pay you \$3000."

He has already used it so he has no option to exercise about not using it. What are you going to do?

THE WITNESS: At that point, any intelligent, at least any publishers who would use that as a ploy would have to consider the fact it wouldn't be used and he would have to make up his mind.

THE COURT: He has already used it.

MR. HRUSKA: It is in the can.

THE WITNESS: You said it was in the can. You said CBS was about to use it. You said it was in the can and CBS was about to use it. That is what you said.

THE COURT: Let's take my question because it doesn't seem to me possible if they have \$500,000 in a movie they are not going to show it because they have a quarrel with you that the price is going to be three thousand or a thousand about a song.

I think it is reasonable under those circumstances if you people haven't reached agreement, they will go ahead and use it. If you are faced with that kind of proposition, what are you going to do?

THE WITNESS: The publisher could sue for infringement.

2 THE COURT: How much could he recover? How  
3 much would the damage be, the fair price?

4 THE WITNESS: Fix a fair price.

5 MR. HRUSKA: That is a matter of law, your Honor.

6 THE WITNESS: You brought it up.

7 THE COURT: I am not taking Mr. Chiantia's opinion  
8 as binding on me, but I think that line of thought has to  
9 be pursued wherever it leads.

10 MR. HRUSKA: Your Honor will find since you  
11 have raised it that there are volumes of literature on  
12 this question of what damages would consist of in the cir-  
13 cumstances and we looked into it. It is a quagmire. It  
14 is very, very unclear. It ranges quite a wide range.

15 THE COURT: I will invite whatever we need on  
16 it when the time comes. It does seem to me relevant with  
17 regard to the music in the can issue.

18 And the question of leverage, which you properly  
19 raised in my opinion, that we see just what the limits of  
20 leverage can be.

21 Q Mr. Chiantia, just one more brief series of  
22 questions on this point. Perhaps only one. If you were  
23 in a situation where the going price for a television network  
24 use of a song was a range of prices, let's say one to  
25 \$5000, and you were approached by CTN under the circumstances

1 I have just described --

2 A Circumstances --

3 Q That I just described.

4 A A motion picture in the can?

5 Q Yes, motion picture in the can. And they  
6 suddenly were without a license to that because they had  
7 suddenly canceled their ASCAP license and this was an ASCAP  
8 song. Wouldn't your tendency be to charge on the higher  
9 side of that range?

10 A I don't know. You are making an assumption  
11 I will not make. I don't know. I don't think so. I  
12 don't think so. Again, I come back to what I told you before.  
13 In your dealing with customers and dealing with users, you  
14 got to establish the fact that you are a reasonable person  
15 and a person to whom they can speak. Now, for example,  
16 if you gave the example before of a premium record. Now,  
17 if I showed that record company that I was unreasonable,  
18 they would just never consult me any more. They would just  
19 cut me out of their program completely.

20 I don't want that to happen. I want them to  
21 continue to use my material. That is what I am in business  
22 for. So I have got to establish with them what my policy  
23 is and they have to be convinced that my policy is reasonable  
24 vis-a-vis their company.

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Chiantia-cross

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If they are convinced of that, they will continue  
to use my music.

If I behalf like a slob, then my music is  
not going to be used. It is as simple as that.

THE COURT: We will take the morning break  
at this time.

All right, gentlemen.

(Recess.)

gabr 1

Chiantia-cross-redirect

1 am 2 MR. HRUSKA: We have no further cross  
2 examination of Mr. Chiantia.

3 THE COURT: Do you have any questions at this time.  
4 Miss Kearse?

5 MISS KEARSE: No. Thank you, your Honor.

6 MR. TOPKIS: Just a couple on redirect, your  
7 Honor.

8 REDIRECT EXAMINATION

9 BY MR. TOPKIS:

10 Q Mr. Chiantia, have you had any recent conversations  
11 with Allen Arrow on the subject of licensing 3M?

12 A Yes, I have.

13 Q When were they or was there one?

14 A In the last few months I have had several  
15 conversations with him.

16 Q Could you capsulize them for us?

17 A Yes.

18 Allen Arrow came to me some time ago to ask me  
19 if I would be interested in going into a new 700 program.  
20 I told him at that time that my reasons for not going  
21 were practically the same, that the licensing of -- at least  
22 the police of use after that period of time, after the  
23 initial period of time, was difficult and he said that he had  
24 a novel concept, he was now going to lease the tapes rather

than sell them, in which case it would be the responsibility of Minnesota Mining to get back the tapes at the end of the period of time.

I told him under those circumstances I would be interested to license. As a matter of fact, I have submitted some 40 odd songs to him for that.

Q And negotiations are underway today?

A Yes.

Q All right.

You said under examination from Mr. Hruska that sometimes in a direct license world, that is to say where you were licensing CTN directly, you might have difficulty locating a writer, you might have difficulty in locating a writer, some degree of difficulty?

A Yes.

Q Would you expect that would happen often?

A No, I don't think it would happen too often.

Q Let me ask you this: Would you expect that it would happen any more or less in a per use world where you had withdrawn compositions from coverage by the per use license?

A I have no reason to suppose that, no.

Q Neither more nor less?

A That is right.

Q Now, today when you are asked to license

gabr 3

Chiantia-redirect

1 synchronization rights, you need with certain of your writers  
2 to obtain their consent when the copyright is more than ten  
3 years old, is that it?

4 A On background music.

5 Q On background music?

6 A Yes.

7 Q Do you frequently have trouble finding a writer in  
8 that situation?

9 A No.

10 Q You routinely are able to find him and make the  
11 deal?

12 A Yes.

13 Q Is that right?

14 A That is correct. As a matter of fact, there is a  
15 provision in the contract, if I recall correctly, which  
16 provides that if we do not receive a response within 72 hours  
17 of our having communicated a -- I think it is a registered  
18 letter, we could go ahead and license.  
19

20 THE COURT: In other words, I take it it is the  
21 writer's responsibility under your agreement to keep you  
22 advised of his mailing address or his whereabouts?

23 THE WITNESS: He would have to, your Honor, or he  
24 wouldn't receive his royalty statements.

25 THE COURT: Aside from that, I assume your

1 gabr 4 Chiantia-redirect

2 contracts provides he is obligated to --

3 THE WITNESS: I don't believe they do, your  
4 Honor.

5 Q Mr. Chiantia, you started to tell something or  
6 another about an incident you had with a TV program called the  
7 Dating Game.

8 Do you remember that?

9 A Yes.

10 Q Mr. Hruska asked you about that --

11 A Yes.

12 Q --- and you started to answer him. You said, no,  
13 that is not a film?

14 A Yes.

15 Q What is the Dating Game?

16 A The Dating Game is a -- was an afternoon program.  
17 It subsequently became the new Dating Game, which was an  
18 evening program, prime time.

19 When they went on prime time with the new dating  
20 game, they decided they wanted to syndicate the old program.

21 Q What do you mean by "syndicate"?

22 A Well, in other words, repeat the performances.

23 They contacted publishers, they contacted us and  
24 we did make an arrangement with them.

25 Q Contacted you for synchronization license?

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2 A That's correct.

3 Q Did you hold them open?

4 A Hardly.

5 Q You were also asked about an Ella Fitzgerald  
6 movie in which there might or might not be a song that  
7 there was some difficulty in licensing.

8 Tell me, in your experience, are motion pictures  
9 which are exhibited on television sometimes cut to eliminate  
10 one sequence or another?

11 A Yes, a five dollar word for that would be  
12 bowdlerized, very often.

13 MR. TOPKIS: No further questions, your Honor.

14 Thank you.

15 MR. HRUSKA: I have a few on recross, your Honor.

16 RECROSS EXAMINATION

17 BY MR. HRUSKA:

18 Q How much background music do you license for  
19 television network use which is more than ten years old?

20 A I don't know. I don't know.

21 Q Do you have any way of modifying the number of  
22 such transactions that might occur in the course of a year?

23 A No, I don't. I do not do that directly, Mr.  
24 Hruska. I have people who do that. I don't have day-to-  
25 day experience.

1 gabr 6

Chiantia-recross

2 THE COURT: You personally don't handle that?

3 THE WITNESS: Yes, I don't personally handle that.

4 Q How do you know under those circumstances  
5 you have no difficulty in reaching your writers?6 A If I had difficulty it would be reported to me by the  
7 person in charge.

8 Q That is your basis for making that statement?

9 A Yes.

10 Q And your only basis?

11 A I know from general experience -- Mr. McLaughlin,  
12 who is in charge of that department, frequently comes in to see  
13 me, sometimes two or three times a week. He brings me up to  
14 date on what is happening during the course of the week.  
15 He tells me about certain licenses, certain new records coming  
16 up, tells me about synchronization licenses which are going  
17 to be issued. If he has problems he comes and discusses them  
18 with me. So I have a pretty fair idea of what happens. I do  
19 not do it on a day-to-day basis.20 Q The Dating Game program, I take it you were ap-  
21 proached by the owners of that program at a time when they were  
22 considering going into syndication; is that what you said?

23 A Something like that.

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Chiantia-recross

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Q And if you had held them upon the sync rights, there was the possibility that they, if you held them up enough, would not go into syndication? Is that your understanding?

A That is a possibility, yes.

Q You said that very often scenes are cut out of movies on television. Could you tell me the basis for that conclusion?

A Yes. It is very simple. I am sure you have seen many motion pictures. I know that Universal sometimes sells motion pictures for television exhibition and very clearly at the beginning of the program you have a notation, edited for television. Anybody can see that.

Q Can you recall any specific instance, Mr. Chiantia, in which a feature performance of a popular song which had occurred in the film in its theatrical distribution was cut out on a television network use of the film?

A Not that I know of, no.

MR. HRUSKA: Thank you.

THE COURT: Thank you, Mr. Chiantia.

(Witness excused.)

MR. COLLINS: Your Honor, at this time we would like to offer in evidence the documents and portions of depositions.

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Chiantia-recross

2 MR. TOPKIS: Wait. We are on our case. We have  
3 a witness here who has been sitting here since yesterday  
4 afternoon. Can't we use his time a little better?

5 THE COURT: Yes, we can. Mr. Hruska, I did say to  
6 you yesterday that at an appropriate time I would be glad  
7 to rule on the question of the documents and so on but  
8 of course I wasn't aware when I responded to your colleague  
9 here that somebody had been kept sitting. I think what  
10 we should do is to go ahead with the witness but at lunch if  
11 you and Mr. Topkis will arrange when you want me to rule  
12 on this business of documents, I will, and I would suggest  
13 that we try to arrange it at the end of this witness' testi-  
14 mony.

15 MR. HRUSKA: Thank you, your Honor.

16 A L A N S H U L M A N, called as a witness by the  
17 defendant, having been first duly sworn,  
18 testified as follows:

19 DIRECT EXAMINATION

20 BY MR.BLUMSTEIN:

21 Q Mr. Shulman, by whom are you employed, sir?

22 A Belwin Mills Publishing Corporation.

23 Q In what capacity, sir?

24 A I am the vice president.

25 Q What business is Belwin Mills engaged in, sir?

2 A We are music publishers.

3 Q Are you affiliated with any record company?

4 A No, we are not; as a matter of fact, we are an  
5 independent music publishing company. We are not affiliated  
6 with any user, record company, motion picture company or  
7 broadcaster.

8 Q Would you try to keep your voice up a little bit,  
9 please.

10 A Sorry.

11 Q You are a member of the ASCAP Board of Directors?

12 A Yes, I am.

13 Q Forhow long?

14 A I think a bitover three years.

15 Q 1970 or thereabouts?

16 A If I am correct it was around July of 1970 that  
17 I was first elected to the board.

18 Q And you have recently become chairman of the  
19 executive committee of the ASCAP board, is that correct?

20 A That is correct.

21 Q Could you very briefly give us your background  
22 from the time that you graduated from college?

23 A I graduated from college in June of -- January of  
24 19 -- June of 1955 -- sorry, I started law school in  
25 February of 1955. I graduated from college I guess it was

2 in January 155. I graduated from Brooklyn Law School in  
3 June of 1958. Was admitted to the bar in December of 1958.  
4 Prior to my graduation from law school, during my senior year  
5 I was a law clerk at Paramount Pictures. Subsequent to my  
6 graduation from law school I was employed by the law firm  
7 Rozinsky, Zahn & Sabrin as an associate and was there for  
8 approximately a year and a half. Subsequently I was an  
9 associate with an individual practitioner, M. Warren Troob.  
10 Subsequently I entered my own practice, practicing  
11 individually and then approximately a year, a year and  
12 a half later formed a partnership and the firm name was Barre &  
13 Shulman.

14 Subsequent to that I was employed as house counsel  
15 at Columbia Pictures Corp. Subsequently to that I was  
16 business affairs director and house counsel at the Richmond  
17 organization.

18 Q When was that in point of time, Mr. Shulman?

19 A Let me see if I can go backwards. That would be  
20 about 1965. April or May of 1965, I believe I joined the  
21 Richmond organization.

22 THE COURT: What is the Richmond organization?

23 THE WITNESS: It is a group of publishing companies,  
24 about 21 or 22 publishing companies if I remember correctly.

25 Q After the Richmond organization?

2           A     In April of 1968 I became the vice president of  
3 what was then Mills Music, Inc. In October of 1969,  
4 Mills Music, Inc. and Belwin, Inc. --

5           THE COURT:     How do you spell Belwin?

6           THE WITNESS:                 B-e-l-w-i-n. -- merged  
7 to form what is now Belwin Mills Publishing Corp.

8           Q     What are your duties as vice president of Belwin  
9 Mills?

10          A     My responsibility is the operation of the  
11 popular music division and the administrative responsibility  
12 for the serious music division. Both of which operate in  
13 New York City. Our main office is in Melville, Long Island and,  
14 of course, I am involved in the general policy making of  
15 our company on all levels but my prime operating responsibility,  
16 as I described it.

17          Q     Does Belwin Mills have a number of subsidiary  
18 or affiliated companies?

19          A     Yes, we do. The basic company is Belwin Mills  
20 Publishing Corp., but subsidiary to that is what was Mills  
21 Music, Inc. and a number of companies that were formerly  
22 within the Mills Music, Inc. group.

23                 We have several other companies that are involved  
24 -- that are BMI affiliates, the company I described  
25 are ASCAP affiliates. Multi-Mood Music, Inc. Deshon

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2 Music, Inc. We have a record production division, MM  
3 Productions, Inc. We have just recently formed a management  
4 division, Lyra Management, Inc. Those are basically the  
5 domestic companies but we have subsidiary corporations through-  
6 out the world which are our foreign affiliates.

7 Q It take it from your answer that some of the  
8 Belwin Mills companies are publisher members of ASCAP and  
9 others are affiliates of BMI?

10 A That is correct.

11 Q Can you tell me the business reasons, if there are  
12 any, why you should have companies which are members of  
13 ASCAP and also companies which are affiliates of BMI?

14 A Well, basically the reason is that we have to go  
15 where the creative people are and there are obviously a great  
16 number of creative authors who are members of BMI, so that  
17 as a publisher in order to be in the business actively we  
18 have to be available to represent them as their publisher  
19 and, of course, that would require us being affiliated with  
20 their performing rights society. And of course, the converse  
21 is true is why we are members of ASCAP.

22 Q Within the overall Belwin Mills corporate umbrella,  
23 are there any companies in which writers have an interest?

24 A Yes. There is one. Ankerford Music. This is  
25 an ASCAP affiliate. Its ownership is what was Mills Music,

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Inc. and Gene Kerr and Leroy Anderson and its original purpose was to publish the score from a broadway musical, Goldilocks.

Q Does Ankerford have anything in its catalog except the score from Goldilocks?

A Not to my knowledge, no.

Q Let us talk for a few minutes about the catalog of all of the Belwin Mills companies.

THE COURT: You mean all of them combined?

MR. BLUMSTEIN: Yes, your Honor.

Q You have a catalog of serious music?

A Yes, we have a very large catalog of serious music. As a matter of fact, I think it would probably be easier if I explained it. I would have to characterize Belwin Mills as a "complete publisher." That is, that we function in just about every area of publishing endeavor that a publisher could. We are involved very much in serious music. Of course, very much in popular music.

We have probably -- this may be a bit immodest but I do believe we are the largest publisher of printed music in the world. We act as agents and representatives for a number of very large foreign publishers of both serious and popular music. We have a, what I would define as a rental division, that is, there is music that is not necessarily

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2 commercially practical to publish because the demand is small  
3 and the cost of publishing is very large, and we make this  
4 available to performing groups by virtue of a rental arrange-  
5 ment where we charge them a fee for the rental of music.

6 Scores and --

7 THE COURT: Orchestral music?

8 THE WITNESS: Yes, as well as ballets, operas.

9 THE COURT: But it is generally serious music?

10 THE WITNESS: Yes, that is correct. Is generally  
11 serious music. I think there are a few what might be  
12 considered light music works that are available on rental  
13 as well.

14 Q Can you give me the names of some of the serious  
15 composers whose compositions are within the Belwin Mills  
16 catalog, just a few?

17 A Well, Rachmanoff, Mahler, Respigi, Puccini.

18 Q That is all. What about --

19 THE COURT: You didn't put out that record  
20 with the ghastly title Mahler's Greatest Hits, did you?

21 THE WITNESS: No, I am afraid not. We don't  
22 have Mahler's Greatest hits. We have unfortunately not  
23 his greatest. We are proud of it nevertheless.

24 THE COURT: He is a marvelous composer.

25 Q I think you mentioned popular music. That would

2 include current hits and contempor. / songs?

3 A Could I not slight our operatic composers in case  
4 they some day read the transcript of this trial.

5 THE COURT: Go ahead.

6 A We do represent a number of the more successful  
7 contemporary composers of opera. For example, Carlyle Floyd.  
8 And I have just supplied a few because my memory just lapsed.

9 THE COURT: How about Menotti?

10 THE WITNESS: Yes.

11 THE COURT: Samuel Barber?

12 THE WITNESS: No. We don't represent Samuel Barber.

13 Q What about Broadway shows, what kind of a catalog do  
14 you have in that area?

15 A That is something that I personally have embarked  
16 upon just recently. Our current Broadway effort is, knock on  
17 wood, very successful. Pippin. We are -- this is an  
18 area that we are very much involved in seeking new properties  
19 to be involved with. Of course, there was Goldilocks as I  
20 pointed out. Hopefully we will have some more. I did have  
21 a failure if you would like to hear about it.

22 Q Now, let us turn to writers for a moment. Do you  
23 have any writers under exclusive contract with Belwin Mills?

24 A Yes, we have a number of them. A number in the seriou  
25 field and a few in the popular field.

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2 Q But generally speaking, do you get writers under  
3 exclusive contracts or do you deal with them with respect  
4 to particular compositions or groups of compositions?

5 A You have to divide it in two. If you are talking  
6 about serious, generally we do have -- if not an exclusive  
7 arrangement, a first refusal arrangement. Sometimes formalized  
8 by a contract, sometimes just one of a relationship.

9 In the pop field, most of the work comes to us  
10 through, not through exclusive agreements. We do acquire them --  
11 we look for writers and writers seek us out. That is how  
12 we acquire most of our popular works.

13 Q In terms of obtaining new writers or new compositions  
14 by existing writers, do you go out looking for new music, does  
15 it come to you, how does it work?

16 A Both ways.

17 Q To what extent do you use the AGAC form of contract  
18 with songwriters?

19 A Very rarely. I believe that I think recently I  
20 signed the first AGAC contract that we have used in perhaps  
21 three years. It is rare.

22 Q Do you as a music publisher have any reasons why  
23 you prefer to use the AGAC contract or prefer not to use  
24 it?

25 A I prefer not to use the AGAC contract.

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2 Q Why is that?

3 A Well, basically it is a very complex agreement and  
4 it is difficult to deal with. Just in terms of reading it.  
5 I think there are very few people, including many publishers  
6 who have been in the business a long time, including a number  
7 of lawyers, who actually know that contract from top to  
8 bottom. But the most important business reason is that it does  
9 not convey to the publisher the renewal term of copyright but  
10 merely the original copyright period and, of course, that, in  
11 effect, cuts in half the period of rights which a publisher  
12 would acquire if we were using a contract which gave him the  
13 renewal rights as well.

14 Q Do you have many dealings with young writers?

15 A Yes.

16 Q In connection with those writers, what do you find  
17 with respect to their requests to use the AGAC form?

18 A It is very rare, as I pointed out. I only had  
19 one instance in about three years. Two or three years.

20 No, I find that most of the young writers are not  
21 members of AGAC.

22 Q They are not members of AGAC?

23 A They are not, that is correct.

24 Q Given your experience in the publishing business,  
25 do you have any views as to the significance of AGAC as an

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2 organization in the music publishing business today repre-  
3 senting writers?

4 MR. HRUSKA: I object, your Honor. I think that is  
5 a very broad generalized question. I don't know that anybody  
6 can give an opinion on that subject that would be entitled to  
7 sufficient weight to receive it.

8 MR. BLUMSTEIN: This man deals with writers every  
9 day, your Honor.

10 THE COURT: I think he might be entitled to give  
11 an opinion. I agree that the question is broad.

12 In what respect --

13 Q As an organization which represents the interests  
14 of songwriters vis-a-vis the publishers.

15 THE COURT: Are you trying to find out whether  
16 there are any people that belong to it? Whether it is useful  
17 to its members, whether it is useful to the industry?

18 MR. BLUMSTEIN: All three.

19 MR. HRUSKA: Your Honor, we do have a great deal  
20 of quantified data on the subject. Specifically the number  
21 of writers in AGAC. The number of compositions they have  
22 in the ASCAP index and other data.

23 THE COURT: That just deals with one of the points  
24 raised. Do you have any views in answer to the question  
25 Mr. Blumstein asked?

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2           A     Yes, I do. I hope I can answer it specifically  
3 because I am not quite clear but I have an opinion. Which  
4 I will give you.

5           I don't think that AGAC today is an important  
6 force in the music industry. I think at one time perhaps  
7 it was but I don't think that it is as important a force  
8 today as it had been.

9           THE COURT: Why do you say that?

10          THE WITNESS: Well, basically, I was present for a  
11 little bit of Mr. Chiantia's testimony yesterday when he  
12 was asked about certain evils that existed, et cetera, and  
13 I think he mentioned that perhaps AGAC was effective in  
14 those days but those practices don't exist. Basically AGAC  
15 performs an auditing function, which I think they utilize  
16 very rarely. They do collect a fee for it -- for  
17 representing their members, which I -- in my honest opinion  
18 I don't feel is justified. I don't think that they really  
19 have an important function in terms of representing writers.  
20 I think writers today are much more sophisticated than they  
21 were in the days that AGAC grew and I think most important  
22 writers and possibly some that hope to be important have en-  
23 gaged lawyers and accountants and other advisors who in my  
24 opinion might fulfil the function of AGAC quite easily.  
25 I just don't think that they are an important force although

2 I must admit that lately they have engaged upon what I would  
3 characterize as a public relations effort in an attempt  
4 to resurrect their image.

5 But I don't feel it is important. I can tell  
6 you that in my own daily business life they are not an  
7 important factor that I need to consider terribly much.

8 Q In your dealings with writers do you have a  
9 standard form of agreement?

10 A Yes, I do.

11 MR. HRUSKA: Can we handle this the same way  
12 as we did the agreements for Mr. Chiantia's company? I  
13 doubt if we will have any objection to it. We would like  
14 to read it.

15 Q Let me show it to the witness and see if I can  
16 identify it. I am pretty sure he can.

17 THE COURT: Is it marked?

18 THE WITNESS: No, it is not.

19 THE COURT: Give me a number. I will mark it.

20 THE WITNESS: This is a contract that we currently  
21 use.

22 (Document marked AX 293 for identification.)

23 Q Mr. Shulman, let us talk for a few minutes about the  
24 promotion and exploitation activities that Belwin Mills  
25 engages in on behalf of its catalog.

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2 Perhaps the easiest way would be to start off with  
3 your printed music division. What kind of activities does that  
4 division engage in?

5 A That is very extensive. It involves -- let me see  
6 if I can describe it generally. A great deal of our pro-  
7 motion in our printed products division is done with mailings.  
8 We have a mailing list of, oh, approximately two hundred  
9 some odd thousand names on it which involve all of the  
10 music teachers, heads of music departments at schools through-  
11 out the country, college, university, high school, et cetera.  
12 We do a lot of direct mailing to the ultimate consumer. We  
13 are in a rather fortunate position in that we enjoy relation-  
14 ships with the music dealers themselves who actually sell  
15 our music to the ultimate consumer in that they will supply  
16 us with their mailing lists knowing that we will not sell  
17 directly but will promote on behalf of our product for  
18 their ultimate benefit, that is, that they will be selling the  
19 product directly themselves.

20 As a matter of fact we also do a lot of imprinting  
21 on a number of our mailing pieces, different mailing pieces  
22 to the ultimate consumers with the local music dealer's own  
23 name stamped on it and address and telephone number and we  
24 even supply the music dealers with these mailing pieces  
25 themselves.

2 THE COURT: Is this something like the practice that  
3 some book stores have, for example, of putting out -- the  
4 brochures they put out around Christmas time advertising  
5 a line of books but their own name has been printed on it,  
6 obviously by the --

7 THE WITNESS: It would seem analogous. This is  
8 quite extensive. More than that we actually send -- let  
9 me deal with the specific example.

10 If we are attempting to create a demand for let  
11 us say a new teaching method for the violin, we actually might  
12 send and very often do send the author of that method on what  
13 we call clinic trips where he will visit local areas, schools,  
14 et cetera and hold clinics for the teachers of music and in  
15 that way introduce the use of his own method tht we are  
16 the publishers of. It is a rather complex thing but it is  
17 very, very extensive and involves a rather large expenditure  
18 on our part in terms of budget.

19 Q In connection with your promotion and exploitation  
20 activities, do you attempt to get any records made of your  
21 -- of the compositions in your catalog?

22 A Now we are talking about -- we are leaving the  
23 print area? Yes, of course, that is the primary  
24 method of exploiting music -- well, one of the primary  
25 methods of exploiting music and this is done both in the

2      popular and serious field. Where we attempt to get our com-  
3      positions recorded by important artists in the hopes that,  
4      A, the records will sell so that we can derive mechanical  
5      income and, B, the records themselves will be performed so they  
6      will eventually generate performance income.

7            THE COURT: Do you actually make recordings your-  
8      selves?

9            THE WITNESS: We do that. It is not our prime function  
10     but today we find that we have to be a bit more flexible than  
11     the old days then just taking a song to an artist. We have  
12     to create the use, not necessarily be the user. So we  
13     produce recordings of our own compositions and hopefully  
14     lease or sell the master recordings to record companies.  
15     This is one way we promote the writer's works and who  
16     very often himself may be a performer.

17           For example, I have a writer under contract to me  
18     who is a performer as well. We have spent money producing  
19     recordings of his performances of his songs. And sold them  
20     to record companies and eventually exploit and hopefully  
21     popularize the work in that way to make the composition  
22     important.

23

24

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Shulman-direct

2           Q     In connection with the granting of mechanical  
3        licenses to record companies, do you use the Harry Fox  
4        Agency?

5           A     Yes, we do.

6           Q     Generally speaking, what are the rates for such  
7        licenses?

8           A     Well, I don't think it is a secret but the  
9        ceiling is the statutory rate which was fixed in the copyright  
10      law, which is two cents per record manufactured. Our  
11      licensing of mechanicals -- mechanical rights is on the  
12      basis of a license that is limited to records manufactured  
13      and sold.    Have I made that distinction clear?

14           THE COURT: Yes.

15           A     But within the framework of the two cents is  
16      the upper limit, we negotiate rates with record companies  
17      depending upon our bargaining position. Many of our  
18      licenses are considerably less than the two cent rate. In  
19      fact, the record company of the plaintiff here, a Columbia  
20      records and their special products division is the one where  
21      we negotiate most actively in terms of reduced rates from  
22      the statutory rate with some difficulty, I might add.

23           Q     What about the licensing of motion picture pro-  
24      ducers, do you carry on those activities through the Harry  
25

2 Fox Agency?

3 A The Harry Fox Agency acts as our agent and there  
4 they provide an administrative function in terms of issuing  
5 the license and collecting and receiving the money, but the  
6 decisions in terms of what the synchronization rights  
7 license will be, in terms of cost, is one that we make our-  
8 selves directly.

9 Q And Miss Mingle is the person at Harry Fox who  
10 performs that function?

11 A Yes.

12 Q What about TV synchronization licenses, do you  
13 use the Harry Fox Agency there too?

14 A Yes. This is a bit more cut and dried than  
15 theatrical synchronization licenses. There is -- the Fox  
16 office is generally aware of what we charge for television  
17 synchronization licenses and this is more of a routine  
18 matter than individual negotiations. It is much simpler  
19 than that.

20 Q Have you ever had occasion to issue a synchroni-  
21 zation license to a TV producer after the fact, that is,  
22 after the particular composition has already been taped  
23 or recorded and is, so to speak, in the can?

24 A Yes.

25 Q Has that happened with any frequency in your

organization?

A Yes, it does. It happens even more now than it did because there are a lot of shows that were original shows, it was created on the spot and the music was performed at the time of the original broadcast was either taped or prerecorded in some way and subsequently these shows that had been performed are up for reuse, syndication, performance outside the United States and there, there would be a synchronization license required and we issue these quite often.

Q What price do you seek to obtain for a synchronization license after the fact of recording and taping?

A Pretty much the same as we would ask for before the fact.

Q Are any of your promotional activities aimed at getting your music played on network television?

A Yes. But there are very very limited number of opportunities to do this. For example, because of the number -- well, they are limited pretty much to the variety shows that appear on the television networks and these are fewer in number of recent years than they were previously.

Q Why are your opportunities limited to the various shows?

A Well, because the other shows are basically

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2                   prerecorded. Prefilmed, et cetera. The series, et cetera,  
3                   are done and produced beforehand and the music that is  
4                   performed and synchronized and used in those programs are  
5                   pretty much controlled by the producers of the particular  
6                   program.

7                   And these producers, in fact, very often are  
8                   publishers themselves who control the publishing rights and,  
9                   naturally, are not too happy to use other people's music  
10                  unless they absolutely have to because there is income from  
11                  it.

12                  MR.HRUSKA: I move to strike that testimony,  
13                  your Honor. I think it is based entirely on hearsay.

14                  MR. BLUMSTEIN: It is based on the witness'  
15                  experience in attempting to license TV motion pictures.

16                  THE COURT: Overruled.

17                  Q         Let's talk about TV variety programs and the  
18                  efforts you devote in that direction in terms of getting  
19                  your music on those programs. Can you give me an example  
20                  from the recent past in which you have made an effort  
21                  to get something in your catalog on a TV variety program?

22                  A         Yes. Me personally, I can tell you about one  
23                  and I can tell you about one that happened the other day.

24                  Q         Let's have both. First you personally.

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Shulman-direct

A Personally, I attempt when Pippin , the Broadway show that I mentioned opened on Broadway, and it was -- it looked like it was a hit, and it was, I attempted to get maximum exposure for the score. This is something I was very much directly involved in, the exploitation of that score because it was my first Broadway show. And I personally contacted Bob Wright, who I think is the producer or assistant producer of the Carol Burnett Show in an attempt to get him to use some of our material.

Making the pitch, this was a very important musical and there were some songs in the show which were, I thought, very good for Carol Burnett, some situation songs, comedy songs, and we spoke about it and as a matter of fact, I sent him -- well, only before we had published the formal -- actually published the selections from the score, I sent lead sheets and some, I think demo recordings that we had at the time.

I subsequently followed up by sending the full actual printed music and a copy of the original cast album. I even offered for, to get him tickets for him to see Pippin with Carol Burnett when she was in New York. She opted to see something else that night, but I think he went.

In an attempt to get them to use our music from

2 Pippin on that show.

3 Q Were your efforts successful?

4 A I am not really sure because I don't watch the  
5 Carol Burnett Show. I am not sure -- I expect it will  
6 be eventually. I hope so.

7 Q You mentioned something that happened quite  
8 recently?

9 A Yes. This is another TV variety show. Johnny  
10 Mann Singers, Stand up and Cheer. I think it is called.  
11 In this show we tried with a manuscript song. In other  
12 words, a song that hasn't already established some popular-  
13 ity because we felt it was peculiarly suited to Johnny Mann.  
14 It was a very patriotic America is Beautiful type song, and  
15 we just missed out because he had just finished doing his  
16 last show for the season. Hopefully he will do it the  
17 first show next season.

18 Q Did you make any efforts to get your music on  
19 Captain Kangaroo?

20 A Yes.

21 Q Did you have any measure of success as to that  
22 program?

23 A Yes, quite a bit of success.

24 Q Do you know someone by the name of Marylou  
25 Williams?

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Shulman-direct

A Yes. I don't know her personally, but the --  
I know we send her quite a bit of material and we are  
constantly in touch with her.

Q What does she do?

A She is a clearing house for the synchronization  
rights for television films. What she tries to do is clear  
in advance the fee for synchronization of musical composi-  
tions with the television motion pictures that her clients  
produce. And we do quite a bit of business with her. She  
is, I would suspect that we are in practically weekly touch  
with her, at least business affairs director of my company  
is.

Q You said before that you have ASCAP publishers  
membership and BMI affiliates. Would you tell me from  
your point of view as a music publisher whether you see any  
advantages in belonging to organizations such as ASCAP  
and BMI?

A Well, without trying to be facetious, there  
are certain truths that are self-evident. It is absolutely  
imperative for a music publisher who has a large catalog  
to belong to an organization that could act as an intermed-  
iary with myriads of users in, not only in performing  
rights, but every other field of music. But particularly

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2           in the area of performing rights. We would not be able to  
3           have, at least if our catalog is good, I think it would  
4           be impossible to get off the phone if it were not for these  
5           organizations that do the licensing of performing rights.  
6           Both the licensing and collecting and auditing of users  
7           who pay on percentages. This is something that an individual  
8           publisher could not with any degree of practicality under-  
9           take on a broad range across the whole spectrum of users.

10          Q       Belwin-Mills is a member of NMPA, is that  
11           correct?

12          A       Yes.

13          Q       Are you a member of the board of directors of  
14           NMPA?

15          A       Yes, I am a member of the board of directors  
16           and as well, I am on the board of directors of the Harry  
17           Fox Agency, which the NMPA owns.

18          Q       We covered with Mr. Chiantia the subject of  
19           the activities of NMPA, so I will skip that as far as you  
20           are concerned. Does Belwin-Mills belong to any other  
21           local trade associations in the music publishing business?

22          A       Yes, we have a membership in the MPA.

23          Q       What is the MPA?

24          A       That is the music publishers association. It  
25           basically is an association of music publishers that

2 deal in the field of printed products and since we are  
3 very much involved in that, we belong to it. I am not  
4 involved in that myself personally but somebody from our  
5 printed products is.

6 Q Mr. Shulman, I want you to assume that Columbia  
7 Television Network no longer had a license from ASCAP or a  
8 license from BMI. My question to you is, in that situa-  
9 tion, would you be prepared to sit down and discuss with  
10 representatives of the network or with producers of network  
11 programs the subject of direct licenses for material in your  
12 catalog to those producers or to the network?

13 A Yes.

14 Q Do you think that those talks might lead to  
15 active negotiations?

16 A I would hope so. That would be the purpose of  
17 talking, would be to lead to negotiations. Whether they  
18 would be successful or not, I can't answer.

19 Q In your judgment, would the -- such discussions,  
20 such negotiations or the making of contracts with CBS or  
21 the producers of CBS programs be an act of disloyalty on  
22 your part either to ASCAP or BMI?

23 A No. Maybe I ought to clarify something. ASCAP  
24 and BMI exist for my benefit. When I say "my," I mean as  
25 a music publisher. They are -- they serve me. Even though

I am on the board of directors of ASCAP, that is still what the function of ASCAP is, is to serve the interests of music publishers and of course, authors and composers.

No, I don't think it would be disloyalty. I don't think it comes up in the order of priorities of disloyalty, if there are any.

Q Do you have any views as to how your writers might react if you entered into such discussions and negotiations?

MR. HRUSKA: Your Honor, I would object to that question unless a foundation is previously laid for it. The basis for his having an opinion regarding his writer's views on that subject.

THE COURT: I will allow him to give his opinion and then give the reasons for his opinion.

A Okay. Based upon my experience in dealing with writers, with authors and composers generally, I have found that -- and I can't even remember any real exception, that whenever I have done something that involved their rights, they have fully well realized that it is basically on their behalf as well, and being what I think as a good publisher making good judgments, I feel the decisions I make are in the best interests of my writers as well.

And on the occasions where this has come up,

2      I haven't had any feedback from any of my writers. As  
3      a matter of fact I --

4                    THE COURT: What does that lead you to conclude  
5      that the writers would think if you did deal directly with  
6      CTN?

7                    THE WITNESS: I think it would depend if I  
8      made a good deal with CTN they would ultimate think.

9                    THE COURT: In other words, your view is their  
10     concern would not be with whether you dealt with CTN directly  
11     or not, but what kind of outcome resulted?

12                  THE WITNESS: Certainly.

13                  Q        Mr. Shulman, I think you said before that in  
14     April or May of 1965, you joined the Richmond organization  
15     and --

16                  A        My title was business affairs director. I  
17     was house counsel with my left hand and business director  
18     with my right hand.

19                  Q        After you joined the Richmond organization,  
20     did a representative of 3M approach the Richmond organization  
21     and seek a license in connection with the M700 series of  
22     tapes?

23                  A        I think they approached the Richmond organization  
24     before I got there.

25                  Q        Which would have been when, '65?

1  
2 THE WITNESS: I think April or May of 1965,  
3 but I think the approaches were made before I got there.  
4 I know there had been some talk before I had gotten there.

5 Q In your capacity as business affairs director,  
6 did you acquaint yourself with the proposed arrangements  
7 with 3M?

8 A Yes, I did.

9 THE COURT: When did you start at Richmond?

10 THE WITNESS: I believe it was April or May  
11 of 1965.

12 THE COURT: So it was just before that?

13 THE WITNESS: I think they may have contacted  
14 them before that. I do believe there was some preliminary  
15 talk before I got to Richmond and I --

16 THE COURT: Anyway, it was in the incipient  
17 stage when you got there?

18 THE WITNESS: Incipient? Yes.

19 THE COURT: Do you know what that word means?

20 THE WITNESS: Yes.

21 THE COURT: I wasn't sure the way you answered.

22 Q You did consider that proposal?

23 A Yes, I did.

24 Q Did you have discussions with anyone concerning  
25 that proposal either within the Richmond organization or

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Shulman-direct

2 outside?

3 A To the best of my recollection, I discussed  
4 them only with people within the Richmond organization.  
5 Although I think after the fact I did have a few words  
6 on the subject with Harold Orenstein, who is a partner of  
7 Allen Arrow.

8 Q Did you as business affairs director reach a  
9 conclusion as to whether the offer being made by 3M should  
10 be accepted or rejected?

11 A Well, I did make the recommendation that it be  
12 rejected but there were several offers in the sense that  
13 they changed the ground rules of the deal while it was  
14 being talked about.

15 THE COURT: Well, did you recommend the final  
16 offer --

17 THE WITNESS: My final recommendation was that  
18 it be rejected.

19 Q What was the basis for that recommendation?

20 A Basically I thought it was a bad deal.

21 Q Why?

22 A I thought from two points of view. I thought  
23 that economically I didn't think that enough was being paid  
24 for the use of a tune. And I thought, as a practical matter,

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Shulman-direct

it was going to be very difficult to police. I am carrying myself back in time eight years and it is hard to recall what my thinking was.

My best recollection is that I had been sensitized and sensitive to the policing of licenses when I was with Columbia Pictures prior to going to Richmond.

I think that may have affected my judgment so I may have focused rather hard on the problem of policing the licenses which were being issued. I thought this was going to be very, very difficult if not impossible for the Richmond organization to police the uses of its works.

I thought that it was going to be next to impossible and if it were to be undertaken, it would be costly beyond the benefits that the license would produce in terms of income.

THE COURT: You are talking about the expiration--

THE WITNESS: At the expiration of the licenses, that is correct. I remember doing some arithmetic and I came out with a performance fee which was something like point -- well, about three or four or 5/100 of one cent for a particular performance of the composition. I don't remember exactly how I got to that, but I remember it was

very small. But I was very much concerned about the policing.

Q Do you recall how many songs 3M was willing to guarantee to put on your tapes?

A My best recollection is that when it finally got down to the final offer, that it was something around 12 or -- ten or twelve tunes. It was a number that made the deal even less interesting than originally and I think that really was the crunch, as it were, which is why we decided to not go through with the deal.

THE COURT: In other words, if, for example, if you are right that it was 4/100 of a cent performance and you had 12 tunes, you would get about a nickel for each playing of the tape, is that right?

THE WITNESS: Right.

MR. TOPKIS: No, it would be half a cent.

THE WITNESS: It would be half a cent.

THE COURT: Right. Half a cent.

Q Let me show you a copy of a document which is already in evidence as 3M PX47. Have you read it?

A Yes.

Q Can you identify it, please?

A Yes, it is a letter dated July 15, 1965, on the letterhead of the Richmond organization. And it is my

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Shulman-direct

letter to Allen Arrow concerning 3M with Hollis Music, Inc., which was one of the companies within the Richmond organization.

Q Mr. Shulman, the first paragraph of that letter reads as follows: "After giving serious consideration to the proposal for 3M usage of our compositions, we have decided that as a matter of policy we would like to pass this one up."

Can you enlighten us on what matter of policy you were referring to when you wrote that letter?

A What this letter means is that we are not going to make the deal. We decided it is not a good deal. I think that what I used here were words that politely said, (a), it is a rotten deal, as a matter of fact, you have changed it several times and we just don't like it. As a matter of fact, I personally was kind of annoyed about the way this deal had progressed because the ground kept shifting. Originally there were a whole number of tunes let me say this. Allen Arrow is a friend of mine. He continues to be. I think I was --

THE COURT: It was a euphemism?

THE WITNESS: Right.

MR. BLUMSTEIN: I have no further questions.

MR. HRUSKA: I wonder, your Honor, whether in view

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of the hours, it being 12:30, we might break before cross-examination.

THE COURT: I would like to get back then around ten of 2:00.

(Luncheon recess.)

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1 PM

zb-1

AFTERNOON SESSION  
1:50 P.M.2 ALAN SHULMAN resumed.  
34 CROSS-EXAMINATION  
56 BY MR. HRUSKA:  
78 Q Mr. Shulman, just a preliminary first. Would it  
9 be a fair estimate if -- a fair estimate that each of the  
10 three television networks make approximately as much use  
11 each year of the Belwin-Mills music?  
1213 A I really could not answer that because the per-  
14 forming rights statements that I see do not have them broken  
15 down by network user so I couldn't be certain of that.  
1617 THE COURT: Do you have any opinion one way or  
18 another over a period of time --  
1920 THE WITNESS: I do feel that CBS is a larger user  
21 than the others.  
2223 Q A larger user, you say?  
2425 A Yes.  
2627 Q Is there any particular reason why --  
2829 A I think probably we have been rather successful  
30 with the Captain Kangaroo Show. And I think that that would  
31 account for substantially larger use on CBS than the other  
32 networks, but I am not exactly certain of that.  
3334 Q Do you know what the situation was for TRO,  
35 whether any one network made more usage of TRO music than --  
36

A I wouldn't be able to give as good an estimate--  
TRO is the Richmond organization, your Honor.

MR. HRUSKA: TRO is the Richmond organization.

THE COURT: It does stand for temporary restraining order.

Q I would like to show you, Mr. Shulman, an offering statement put out in January, 1965, by the Mills Music Trust.

THE COURT: Is that in evidence?

MR. HRUSKA: It is not in evidence, your Honor.

THE COURT: What number?

MR. HRUSKA: I would like the reporter to mark it for identification as Plaintiff's Exhibit 906.

(Plaintiff's Exhibit PX906 was marked for identification.)

Q Could you look at Page 12, Mr. Shulman, and -- that is 12 through about half of Page 15.

A Yes.

Q Could you tell us what that is?

A Well, this is a schedule of the --

THE COURT: Are you talking about those pages in particular?

MR. HRUSKA: Yes.

A Without going into the text, but just the

1      zb-3

Shulman-cross

2      schedule portion.

3      Q      Right.

4      A      This is a schedule for the, I believe it is  
5      114 titles in the Mills Music catalog which was the larger  
6      earners than existing in the Mills Music, Inc. catalog.

7      THE COURT: As of what time?

8      THE WITNESS: I assume the time of the offering  
9      statement which was in 1965. January. Is that right?

10     Q      Right, January 12.

11     MR. TOPKIS: Just so the record will be clear,  
12     your Honor, the document states it is during the five  
13     years ending December 31, 1963. And could we just put our  
14     friend on notice that the relevance of this escapes us, but  
15     I am sure he will develop it.16     THE COURT: I am sure he was on notice of that  
17     before you said so.

18     MR. HRUSKA: I am on a standing notice.

19     Q      Have you ever seen a list like that before, of  
20     Belwin-Mills Music?

21     A      Are you talking about Mills Music?

22     Q      Mills Music, right.

23     A      Yes, I have seen this list before, surely.

24     Q      Could you give us an estimate of the, a rough

2 estimate of the percentage of the songs listed on this  
3 schedule which were written by AGAC writers?

4 A No, I couldn't.

5 Q Or to put it another way, which Mills Music  
6 has in its catalog by virtue of AGAC form contracts?

7 A No, I couldn't.

8 Q No idea?

9 A No.

10 Q Would you have an idea as to whether it was more  
11 than half?

12 A No idea, means no idea.

13 Q Okay.

14 A I don't know if it would help you, but a number  
15 of these compositions are in the renewal period. In other  
16 words, not during the original period of copyright. Which  
17 would mean that they would not be subject to the AGAC agree-  
18 ment, which only applied to the original period of copyright.  
19 The acquisition of renewal rights could be on an agreement  
20 and probably would be on an agreement that had no relation-  
21 ship to AGAC agreements.

22 Q I thought you had said that under the AGAC  
23 agreement, and one of the reasons you didn't like the  
24 AGAC agreement, was that it did automatically give writers  
25 back --

A That is precisely my point.

THE COURT: They are free --

Q So that when you renegotiate with an AGAC writer,  
you might not give that AGAC writer the AGAC contract?

A That is my point.

Q I guess the remaining basis for my confusion  
is I thought when you negotiated or when you made a deal with  
an AGAC writer, you had to give the AGAC writer the AGAC  
contract.

A No. As a matter of fact there is no prescribed  
AGAC agreement dealing with renewal rights.

Q Do you know of any situation in which an AGAC  
writer, when the copyright was returned to the writer at  
the end of the first term, signed an agreement with your  
publishing company which was other than the AGAC agreement?

A I appreciate there are a number of those.

Q Could you give us the name of any such writer?

A I believe that the agreement with Hogie Carmichael  
on Stardust was completely different than an AGAC agreement.  
In fact he got much better terms.

THE COURT: Is Stardust yours?

THE WITNESS: Yes.

MR. HRUSKA: It is a nice one-word title song.

THE COURT: I was thinking of it yesterday.

1       zb-6

Shulman-cross

2           Q     Do you happen to know whether that agreement  
3     with Mr.Carmichael is one in which you must obtain Mr.  
4     Carmichael's consent to direct licensing transactions  
5     involving --

6           A     I am not sure but I can tell you that in the  
7     years that I have been involved with Mills Music, I haven't  
8     approached Hogie Carmichael for consent on any license that  
9     I have felt or had the opportunity to issue. So it may not  
10    answer your question, but that is --

11          Q     Can you think of any other writers with whom  
12    after the first term -- AGAC writers, whom after the first  
13    term you were entering into non-AGAC forms of agreements?

14          A     Yes, I have. As a matter of fact, fairly recently  
15    I acquired the renewal rights to Scarlet Ribbons and that  
16    was not on an AGAC agreement, although the royalty terms  
17    were as specified in the AGAC agreement, but not the general  
18    terms of the agreement.

19          Q     How often within your tenure at Belwin-Mills  
20    or Mills has the occasion arisen in which an AGAC contract  
21    came to an end as to a particular song in your catalog?

22          A     It hasn't happened at all with any song that  
23    was of any meaningful importance. Otherwise I would  
24    have been involved in renegotiating or trying to acquire

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2  
renewal rights.

3 Q Other than Stardust?

4 A No, I wasn't involved in the acquiring of Star-  
5 dust, with the exception, as I pointed out, of Scarlet  
6 Ribbons, which is a negotiation that I undertook myself.

7 Q I would like to show you a document, Mr.  
8 Shulman, which has been previously marked for identification  
9 as 3M PX159, and ask you to read quickly through that.

10 A Just this one memo or all of these?

11 Q I believe it is --

12 A It is a series of memos.

13 Q There are two memos and attached a list of songs.

14 THE COURT: Do you want him to read the whole  
15 thing?

16 MR. HRUSKA: It is really only four paragraphs.

17 They are very short.

18 THE COURT: Okay.

19 A Yes.

20 Q Could you identify Al Brackman, whose name appears  
21 on that memo?

22 A Yes. Al Brackman's title at the Richmond organiza-  
23 tion was general manager. I believe he also has a proprietary  
24 interest in the Richmond organization.

25 Q He had been there for some time prior to your

2 arriving at the TRO?

3      A      Yes.

4      Q      Do you know about how many years?

5      A      I think practically from its inception -- well,  
6      TRO -- the name TRO arose some time just before I got there,  
7      but he was the -- he was there from the beginning of the  
8      organization of all of the companies, pretty close to the  
9      very beginning.

10     Q      He was your superior in the company?

11     A      Yes, I would have to say yes. In what respect  
12    now, by superior, do you mean? Did I report to him?

13     THE COURT: Was he higher on the table of organiza-  
14    tion than you?

15     THE WITNESS: Yes, he would be.

16     Q      Could you describe this document for the record?

17     A      Yes. It is a memo from Al Brackman to J. Mark,  
18    who was the head of the copyright department of the Richmond  
19    organization wherein Brackman asked Mark to open up a  
20    contract file under the name of 3M to put these papers into.

21     Q      And the date is May 20, 1965?

22     A      That's right.

23     Q      And there is a reference to a man named Paul  
24    Sheldon. Do you know who he was or is?

25     A      I believe that he was the arranger, organizer,

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**Shulman-cross**

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recording producer for 3M who actually put together what works were going to go into the 3M tapes.

Q And this -- these two memos attached is a list of compositions which Mr. Sheldon at that time had indicated he had some interest in?

A The memo says please note the 51 selections that Sheldon indicated could be used if we effect a contract on the 3M deal.

MR. HRUSKA: I would like to offer this document  
in evidence, your Honor.

MR. TOPKIS: We have already said that we have no objection to it.

**THE COURT:** Received.

(Plaintiff's Exhibit 3M PX159 was received  
in evidence.)

Q When you were considering the 3M deal, Mr. Shulman, did you --

## THE COURT: At Richmond?

MR. HRUSKA: At Richmond, yes, your Honor.

Q Did you come to any conclusion regarding the --  
regarding whether you would have any out-of-pocket costs  
in the transaction?

A You mean in signing the contract?

2  
Q Yes.3  
A It didn't cost anything to sign the contract,  
4 no.5  
Q Did Mr. Arrow indicate to you that while the  
6 guarantee that 3M was offering publishers was based on an  
7 estimate of sales, their actual estimate or realistic esti-  
8 mate of the number of sales that they would be able to  
9 effect was a good deal higher?10  
A First I never had any conversations with Allen  
11 Arrow.12  
Q I thought you had.13  
A But maybe I can help you a little bit and  
14 answer the question this way: I think that had I then  
15 known what I now know, I think my answer --16  
THE COURT: I really don't think you are answering  
17 the question.18  
Q When you wrote your letter to -- oh, by the way,  
19 your Honor, I don't believe -- I made a mistake in that 3M  
20 PX47 -- I am sorry, I am corrected.21  
When you wrote your letter, which -- a copy of  
22 which you were shown this morning by Mr. Blumstein, 3M PX47--23  
THE COURT: Is that the one that talks about the  
24 matter of policy?25  
MR. HRUSKA: Yes, your Honor.

Q And the letter is dated July 15, 1965. When you wrote that letter turning down the 3M deal, how many songs were under consideration in the negotiations between you and 3M?

A I am not really sure. My best recollection is is that at that point in time we were down to 12 songs. That is my best recollection.

Q I would like to refresh your recollection, if I may, by showing you 3M PK166 for identification -- not in evidence.

12 Is this a document you received, Mr. Shulman?

13 A I believe so, yes.

14 Q It was sent by Mr. Brackman to Mr. Richmond and  
15 yourself?

16 A Right.

17 Q The document is dated February 25, 1966 and it  
18 contains this statement, "Turned out that instead of the  
19 25 songs we were speaking of during last conversation about  
20 two weeks ago, they are interested now in using 15 songs."

21 Does this document, particularly that sentence,  
22 refresh your recollection that as of July 1965, you had not--

23 A They may still have been talking about 50 titles.  
24 Yes, it is possible. I don't remember it as clearly as  
25 you would like me to, but --

Q I know it is some years ago.

MR. HRUSKA: I would like to offer this document, your Honor, too. PX166 - 3M PX 166.

MR. TOPKIS: There is no objection, but what do we need it for?

THE COURT: It seems to me you have gotten a concession it may have been 50.

MR. TOPKIS: 15.

THE WITNESS: Actually I think it is 51, because according to the original schedule, there were 51 titles. But let me see if I can remember it even a little better. I think it was the 51 titles that were being considered. This doesn't mean that they were going to use all of them. I don't think we had the assurance they were going to use all of them at any one time. As a matter of fact, if I recall correctly, there was some question as to which ones Paul Sheldon was actually requesting -- going to pick. That was never actually clarified. It was those titles that were submitted -- I remember it better now -- those titles were submitted because I think there were some things we had to check on. For example, whether there were any split copyrights. In other words, other copyright proprietors. I think this was the -- the list of 51 had the total list of all those that they would consider possibly. I don't

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Saulmax-cross

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think that they had pinned themselves down. In other words, it was not a schedule attached to an agreement for signature. I think it was submitted to us for the purpose of clearing whether those titles had joint copyright proprietorship, whether we could substitute others where we would not have to share with another proprietor if there were any fee if we did make the deal.

Q The case is not going to turn on whether the number is 51 or 25. Is it a fair statement that you were dealing with some number in between those two extremes?

MR. TOPKIS: Not at all.

THE COURT: Just a minute. Don't answer for

MR. TOPKIS: The record is clear, your Honor, and the witness has testified he can't remember. What in the name of God difference does it make?

MISS KEARSE: Your Honor, I am not sure we are talking about the same document. The same as the one Mr. Hruska just offered. I believe he just offered BM PX166, and the witness has been describing a document that was just admitted, which is BM PX159, I believe. So it seems to me we are not --

THE COURT: There are two different evidentiary

questions. One is whether a particular document can go into evidence. As far as the other document is concerned, although it is always good for people to be talking about the same thing, even if he is talking about something different, if his recollection is refreshed to the point where he can remember what happened or approximately what happened, of course, he is free to testify about it.

Now, what document is it you want to put into evidence?

MR. KRUSKA: 3M PX166.

THE COURT: What do you have before you?

THE WITNESS: I have that one.

THE COURT: With regard to -- never mind what the fair question is or not, with your recollection refreshed, what is your best estimate as to about how many songs were being discussed. But there are two different aspects to that discussion. One is an outside list of it being discussed as a sort of recruiting area.

The other is the inside area of the number of songs they were likely to use, is that correct?

THE WITNESS: I don't think I can tell you how many for certain they actually intended to use when they were talking about 31 or 35.

My best recollection is when it came down to the crunch, it was about 12 or 15.

Q When was the crunch?

A The first crunch?

The first crunch was the -- right after the letter that I sent to Allen Arrow.

Q What I am trying to get at, really, more specifically, Mr. Shulman, is what was that number as of the time you sent that letter to Mr. Arrow.

THE COURT: I thought he answered that twice.

He said it was about 12 to 15.

THE WITNESS: No, your Honor. I said there was a list of 51, I assume prospective titles. How much were actually intended to be used I cannot answer because I don't remember an agreement with a schedule of an actual number of titles on it at that time.

THE COURT: Well, I am not asking you whether there was ever a schedule which said how many they were going to use, but do you recall what the expectations were or what the range of discussion was, not as to how many you might pick from, but how many you might fully use, if a deal went through?

THE WITNESS: It was within that range.

1 THE COURT: Which range?

2 THE WITNESS: 12 to 51.

3 THE COURT: All right.

4  
5 MR. HRUSKA: I would like to show the witness two  
6 documents at once, your Honor, because they are interrelated.  
7 They are 3M PX167 for identification and 3M PX168 for identi-  
8 fication.

9 Q 167. 168. Could you identify 3M PX 168  
10 first. That is the second one I gave you.

11 MR. TOPKIS: Your Honor, do we have to waste  
12 this time every time? It is stipulated as to every one  
13 of these documents that it was sent by the person who appears  
14 as the sender, received by the person who appears as the  
15 addressee, at or about the date there appearing.

16 THE COURT: Then you can simply state what it is.  
17 If you want to establish his knowledge of the document,  
18 you can ask him if he knows about it.

19 Q Do you recall, Mr. Shulman, having received  
20 168, 3M PX168?

21 A I can't honestly say I remember receiving it.  
22 No, I must have received it. I don't remember it.

23 Q The memorandum refers to the AGAC letter. Do  
24 you see that?

25 A Yes.

2 Q Do you recall having received the AGAC letter,  
3 which is a part of 167?

4 A 167?

5 Q 3M PX167.

6 A I will have to read it because I haven't seen  
7 this.

8 THE COURT: Go ahead.

9 Is it stipulated he did receive it?

10 MR. HRUSKA: Yes.

11 THE COURT: Are you trying to establish his  
12 knowledge in addition to the stipulation?

13 MR. HRUSKA: I want to refresh his recollection  
14 about the matters involved in these two letters so I can  
15 ask him specific questions.

16 THE COURT: Let him read the letter.

17 MISS KEARSE: I think actually, your Honor,  
18 BMI did not enter into that stipulation.

19 THE COURT: The understanding is you are not  
20 bound by it, if there is anything in the examination of  
21 the witness --

22 MISS KEARSE: There was never any foundation  
23 laid in the depositions for it, so we are unable to stipulate.

24 THE COURT: I guess if you want the letter to be

binding on BMI, you will have to establish that he received it.

A Yes.

Q Do you recall having received that AGAC letter?

A Yes.

THE COURT: Which one? 167?

THE WITNESS: 167.

Q Now, in 168, Mr. Richmond says that --

MISS KEARSE: Your Honor, that is not in evidence and that is the document which I believe no foundation has been laid.

THE COURT: I agree with Miss Kearse that it is improper to read into evidence something that isn't in evidence.

Do you want to put it in, if it is admissible, fine. If you want to ask him questions by his referring to it, that is all right.

MR. HRUSKA: Let me then offer 3M PX167 and 168 into evidence.

MISS KEARSE: I object to both of them and specifically 168 on the ground that no foundation has been laid and the witness has said he does not remember receiving it.

1  
2 THE COURT: Well, he said he can't recall  
3 receiving it, but he must have received it, is that correct?

4 THE WITNESS: I am afraid I did say that.

5 THE COURT: It is not a question whether you  
6 are afraid. If that isn't what you meant you can say.

7 THE WITNESS: I was trying to be a little court-  
8 eous to the lady.

9 THE COURT: In other words, you do believe that  
10 you did receive it?

11 THE WITNESS: Yes.

12 THE COURT: That has some significance but I  
13 don't know whether it is inadmissible for other reasons.

14 MISS KEANGE: We have objected to both these  
15 documents on the ground they are not admissible against  
16 BMI and they are irrelevant.

17 THE COURT: What is the purpose of introducing  
18 it, Mr. Hruska? Are they submitted vis-a-vis BMI in any  
19 respect?

20 MR. HRUSKA: They are submitted vis-a-vis BMI,  
21 through the stipulation.

22 THE COURT: What stipulation?

23 MR. HRUSKA: The stipulation between CBS and  
24 BMI.

25 THE COURT: That what is put in against ASCAP --

2  
is that the stipulation --

3  
4  
MR. HRUSKA: What is proven against ASCAP  
is proven against BMI on this bypass question.

5  
6  
THE COURT: These documents are submitted in  
regard to the bypass question?

7  
MR. HRUSKA: Yes.

8  
9  
MISS KEARSE: I don't believe the fact that  
the witness says he must have received this has laid  
10 a sufficient foundation for this document. The author of  
11 it has not been deposed. He is not here.

12  
13  
THE COURT: What kind of questions did you want  
to ask about it?

14  
MR. HRUSKA: Well, the only way --

15  
THE COURT: Or don't you want to ask questions?

16  
17  
MR. HRUSKA: I would like to ask him about  
a discussion which is suggested --

18  
19  
THE COURT: You can ask that whether you put  
the documents in or not.

2 THE COURT: Just don't say it says here that  
3 so and so.

4 MR. HRUSKA: All right.

5 THE COURT: You can ask him if a discussion  
6 took place and he remembers it. If not, you can ask him  
7 to refresh his recollection from the document.

8 Q Do you recall having had a discussion with  
9 Mr. Richman and/or Mr. Brackman concerning the AGAC  
10 letter?

11 A Vaguely.

12 Q What do you recall about that discussion?

13 A I remember -- let's see how I can best  
14 characterize it. Harry Richman, who was the President  
15 of the Richman organization, I don't think was terribly  
16 happy about my judgment on the 34 deal, and I think that  
17 I recall being -- for reasons other than the ones I gave  
18 him, he decided I was right. I remember feeling kind of  
19 gratified.

20 At that point I was saying to myself that as  
21 long as he agrees with me, it doesn't matter how he got  
22 there.

23 THE COURT: That is interesting. What does it  
24 have to do with the AGAC letter?

25 THE WITNESS: It's not in evidence, is it?

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Shulman-cross

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2 THE COURT: No. I don't understand all you  
3 people. Can't you tell me what happened?

4 You were asked whether you remember a discus-  
5 sion with Mr. Richman and Mr. Brackman about the AGAC  
6 letter. You said yes.

7 What do you remember about the discussion?

8 THE WITNESS: One of the points that was  
9 mentioned in the AGAC letter was the problem of policing  
10 the 3M license, which was the point that I very firmly  
11 made when I was originally consulted on the issue myself.

12 THE COURT: You remember discussing that  
13 letter with Mr. Richman and Mr. Brackman?

14 THE WITNESS: I don't think we discussed it  
15 in any terribly specific detail. I think it really did  
16 revolve on that point.

17 THE COURT: You remember talking about what  
18 the AGAC position was as expressed in that letter; is that  
19 what you are trying to tell me?

20 THE WITNESS: In all candor, I don't remember  
21 discussing any of the elements in the AGAC letter other  
22 than the policing.

23 THE COURT: Do you remember discussing that?

24 THE WITNESS: Yes, that I do remember.

25 THE COURT: Do you remember that as having

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2 originated from the letter? Is that how you happened to  
3 talk about it, because somebody got a copy of the letter?

4 THE WITNESS: No. As a matter of fact, it was  
5 the reason for the discussion that we had. I had previously  
6 expressed my opinion and judgment that the problem with the  
7 3M license was basically one of policing.

8 THE COURT: All right.

9 THE WITNESS: The AGAC letter made that point  
10 as well. That gave occasion for us to reliscuss the  
11 point that I made. I remember having my judgment in a  
12 sense vindicated by Harry Richman by being persuaded that  
13 I was right.

14 Q The AGAC letter which is in evilence in  
15 another form contains the statement, "a most disturbing  
16 element of this situation in our view is tha: 3M is deal-  
17 ing for performing licenses directly with AS'AP publishers.  
18 ignoring completely the writers individually and the  
19 Performing Rights Society of which the writers aremembers."

20 Did you discuss that idea with Mr. Richman or  
21 Mr. Brackman?

22 A That had --- at that time after this letter  
23 was received? I don'trecall specifically. I remember --  
24 my own thoughts on it ~~said~~ that that position didn't par-  
25 ticularly disturb me. It had been one of the elemens of

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2 my original judgment about whether this could or couldn't  
3 be done. I felt that that wasn't pertinent really. The  
4 issue revolved on the policing situation and the economics  
5 of it as I previously described.

6 Q What concerned you particularly about the  
7 policing aspect, Mr. Shulman?

8 A Well, it seemed to me if each licensee was  
9 going to be paying under an existing license something  
10 like three cents for a performing right, and even assuming  
11 we were dealing with all 50 titles, 51 titles or whatever  
12 the number was -- for argument's sake, let's say it was  
13 50 titles, we were still talking about \$1.50 per licensee.  
14 It seemed to me it would be terribly uneconomical for us  
15 to chase a licensee who possessed a tape when we were only  
16 going to net under an original license \$1.50. How could  
17 we effectively and economically be sure we could collect  
18 after the term of the agreement, three years had expired?

19 Q Suppose, Mr. Shulman, that you didn't make  
20 any efforts at all to collect and 3M did not renew its  
21 option to take the license for another three years and  
22 there are all those restaurants and barber shops and what  
23 have you out in the country continuing to use the 3M  
24 cassette player, wouldn't you expect that the ASCAP field  
25 men would pick them up in droves and ASCAP would sue them

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2 for infringement?

3 THE COURT: Are you asking him whether he  
4 expected it now or --

5 MR. HRUSKA: Whether he expected it in 1965,  
6 your Honor.

7 Q Quite honestly I didn't know as much as ASCAP  
8 then as I know now. I remember thinking to myself it was  
9 hard to conceive of somebody else picking up on this  
10 policing function because it was going to be as uneconomical  
11 for them as it was for us, especially because there was  
12 an unfairness really because there were 700 tunes being  
13 used, if I recall, and of the 700 tunes that were being  
14 used, there may have been a dozen or so publishers. In  
15 order to police that it was going to cost a huge amount of  
16 money. Okay?

17 The price had already been established and  
18 the policing of it was going to be uneconomical whether it  
19 was ASCAP or us. I also thought it was unfair to think  
20 that ASCAP would police for, say, a dozen publishers at  
21 the expense of the entire membership of ASCAP, and I didn't  
22 think that they would do it.

23 Q Mr. Shulman, did you know in 1965 that ASCAP  
24 had field men?

25 A I suppose I did, yes.

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Shulman-cross

2 Q Did you know what those field men did?

3 A I think so.

4 Q What was your understanding of what they did?

5 A It's very hard for me to differentiate between  
6 what I know now and what I knew then about something I  
7 now know about.

8 Q Why?

9 A I can't. I really can't.

10 Q What do those field men do now?

11 A They are involved in licensing, trying to  
12 accomplish the licensing of saloons, cabarets.13 THE COURT: Can't we save time by agreeing,  
14 unless I misunderstand the situation, that ASCAP has got  
15 a field force that was capable then and would be capable  
16 now, and you know it now anyway, of doing this policing  
17 job?

18 MR. TOPKIS: What policing job, your Honor?

19 THE COURT: The policing job we have been  
20 talking about, which I understand to be as follows, and  
21 correct me if I am wrong, that is the policing of the use  
22 of your songs at places where people had purchased 3M  
23 tapes after the 3M three-year license had expired; isn't  
24 that what you were talking about?

25 THE WITNESS: Yes, basically, but there was

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2 more to it than that.

3 THE COURT: What is the more?

4 THE WITNESS: I had wondered since this was,  
5 you know, physical changeable property -- I would have  
6 assumed -- one of the thoughts that occurred to me was a  
7 licensee of 3M, a user, a fellow who bought the tape,  
8 after three years he was going to be pretty tired of it.  
9 He might have given it to his brother-in-law or somebody  
10 else.

11 THE COURT: I am not talking about who had it.  
12 The problem would be to find out who was using those  
13 tapes and whether anybody was; isn't that right?

14 THE WITNESS: I suppose so basically, yes.

15 THE COURT: Am I not correct that you now  
16 know and you probably knew then that ASCAP had a force of  
17 people who did this kind of work anyway?

18 THE WITNESS: Yes.

19 MR. TOPKIS: If your Honor please, ASCAP has  
20 never policed a doctor's office, a dentist's office or  
21 anyone of the myriad of other private operations to which  
22 3M -- the record is clear on this. Paul Marks testified  
23 about it. He knows what the ASCAP field force does.

24 THE COURT: Mr. Topkis, I prefer to hear  
25 testimony from witnesses, but I certainly think what you

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2 brought out is relevant. You should bring it out.

3 MR. TOPKIS: It's been brought out already.

4 THE COURT: You should refresh my recollection  
5 by referring to the place in the record where it exists.6 Unless I misunderstood Mr. Chiantia's testimony  
7 this morning, there was no doubt from what he said that  
8 ASCAP in his view possessed the capacity to police this  
9 situation. Now, I don't mean to say that I understood  
10 from that that Mr. Chiantia testified or meant me to  
11 believe that ASCAP had before policed dentist's offices  
12 or all the places we are talking about.13 MR. HRUSKA: They are not making public per-  
14 formances, your Honor.15 THE COURT: I am just trying to indicate that  
16 I think I do understand what the situation is and, in any  
17 event, the facts must be either in the record or roughly  
18 stipulatable. I am almost willing to take judicial notice  
19 of the fact that any one of these witnesses, unless  
20 Mr. Topkis asks me not to take judicial notice with regard  
21 to a particular witness for good reason, who have spent  
22 long years in the industry, had a general working knowledge  
23 of what ASCAP did and was capable of doing.

24 Would you have any objection to that?

25 MR. TOPKIS: Yes, I would, your Honor. I

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would bet Mr. Shulman has never met an ASCAP field representative in his life.

THE COURT: I am not talking about meeting them. He may not have met an IRS man, but he may have a good idea of what an IRS man does.

MR. TOPKIS: The point is this: your Honor turned to him and said, ASCAP policed these people, didn't they? And he, because he's a straightforward fellow, says, yes. And the fact is, your Honor, they don't. Paul Marks, who knows what they do because he supervises them was here and testified all about it.

THE COURT: My mistake. I am reaching in an effort for all of us to cut down on proof of things that are not in dispute. With regard to what ASCAP actually does, it can't be in dispute after four years between Mr. Hruska and Mr. Topkis. The only question then, it seems to me, we need to go into with witnesses, is what witnesses knew about ASCAP's capacity, whether it's right or whether it's wrong, and to the extent it may be relevant. I am asking Mr. Hruska then with future witnesses, when he cross-examines them on this subject, to ask: what did you know about it?

MR. HRUSKA: I would also, your Honor, like to make a very brief statement for the record, that I do

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object to Mr. Topkis in the middle of cross-examination getting up and correcting a witness' testimony. I think the proper place for that is on redirect.

THE COURT: You are right, except I will say this: I think he is entitled to point out to the Court that the Court is proceeding on a mistaken assumption, if I did ask a question which was doing so.

Q Do you have any idea or did you have any idea in 1965, Mr. Shulman, how ASCAP field men could have avoided restaurants or shops or small factories that made commercial performances for profit of music on 3M tapes, after the period of their licenses?

A I really don't understand your question. What do you mean by avoided?

Q How could field men who were charged with the responsibility of detecting unauthorized uses of copyrighted works in places like restaurants avoid finding out that a restaurant was making a use of a 3M tape?

A Well, depends -- it's difficult for me to answer this question. I'm going to do the best I can with it.

It seems to me now, because I did not consider it that way then -- it seems to me now that how could anyone expect the field men of ASCAP to be in every

dentist's office or supermarket or every other user that uses a tape --

Q Please forget dentists's offices. Concentrate on commercial --

A Even supermarkets or wherever else these tapes were sold. I don't know exactly where these machines and tapes were installed. If you can tell me that, maybe I could answer your question better.

Q Did you make any effort to determine from ASCAP --

THE COURT: In 1965?

MR. HRUSKA: Exactly, in 1965.

Q Did you make any effort to determine from ASCAP, any ASCAP representative, the difficulties or lack of difficulties involved in ASCAP policing unauthorized uses of these machines?

A No, I did not.

Q Did Mr. Richman ever say to you that you ought to tell Mr. Orenstein or Mr. Arrow that nothing goes ahead on the 3M deal until there's an industry decision?

MISS KEARSE: Objection, your Honor. It would call for hearsay.

MR. HRUSKA: It would be an admission if it

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were made, your Honor.

THE COURT: Is Richman a defendant here?

MR. HRUSKA: Yes, your Honor.

THE COURT: All right. Overruled.

MR. TOPKIS: I suppose we even represent them.

THE WITNESS: Could you repeat the question?

THE COURT: You were asked whether Mr. Richman said to you -- what?

MR. HRUSKA: That you ought to indicate to Mr. Orenstein or Mr. Arrow or some representative of 3M that nothing goes ahead on the 3M deal until there's an industry decision.

A I didn't remember it until I saw this document.

THE COURT: Now that you have seen it, do you remember?

THE WITNESS: Again, I have to assume that I did get this memo. So I assume he did say it, and he probably did. However --

THE COURT: Don't however us. We have enough without the however.

Q What did you understand Mr. Richman to mean when he said nothing goes ahead until there's an industry decision?

2 A I don't remember that. I don't remember  
3 what I understood him to mean.

4 MR. HRUSKA: I would like to offer the docu-  
5 ment in evidence, your Honor.

6 MR. TOPKIS: Which one?

7 MR. HRUSKA: 3M PX 168.

8 MISS KEARSE: I still have the same objection,  
9 your Honor.

10 THE COURT: That it's hearsay?

11 MISS KEARSE: There's been no foundation laid  
12 for the introduction of this document, your Honor.

13 THE COURT: I have already ruled in that  
14 regard. When a witness says he's confident he received  
15 it -- whether he recalls it or not, I don't think it's  
16 necessary that the word recall be used. I will receive it.

17 (Plaintiff's Exhibit 3M 168 received in  
18 evidence.)

19 (Continued on next page.)

20

21

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23

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2 MR. HRUSKA: I would like to have this document  
3 marked PX 907 for identification.

4 (Plaintiff's Exhibit PX 907 was marked for  
5 identification.)

6 Q Could you look at that, Mr. Shulman. Could you  
7 briefly identify that? That is the only thing I am going to  
8 be asking you about is --

9 MR. TOPKIS: We will take your identification  
10 just to move it along.

11 MR. HURSKA: It is a Form 8K --

12 THE COURT: SEC form?

13 MR. HRUSKA: Yes. Put out by Utilities &  
14 Industries Corp. and that is the parent of Belwin Mills?

15 THE WITNESS: No. It was, up until the end of 1969,  
16 the owner of Mills Music, Inc. It is not the parent of  
17 Belwin Mills. It is presently a minority stockholder  
18 in Belwin Mills Publishing Corp.

19 THE COURT: Is this for a period before the end  
20 of '69, in other words --

21 THE WITNESS: This is for the month of September  
22 1969 and this was prior to Mills Music, Inc. and Belwin,  
23 Inc. merger.

24 Q Since these pages are not numbered, could you look  
25 at the eighth page from the back which is headed "Re Journal

2 Entry 11".

3 A Yes.

4 Q There is an item there --

5 MISS KEARSE: Hold it. We haven't found it  
6 yet.7 Q There is an entry there dealing with unlocated  
8 composers, do you see that?

9 A Yes.

10 Q Balances over seven years old?

11 A Yes.

12 Q Are you familiar with the difficulty, if any, that  
13 you have had in distributing those moneys to those unlocated  
14 composers?

15 A No.

16 Q It is not the sort of problem that comes to your  
17 attention?18 A Well, let me say this, that if there were ahy  
19 sizable amount in any one year, I certainly would make every  
20 effort but my guess is, if I may guess, your Honor, that this  
21 balance of 43,000 has probably been carried from, oh,  
22 I don't know it could be as much as 20 or 30 years old.  
23 I would have no way of knowing what that amount  
24 consisted of.

25 Q Or how many writers were involved?

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Shulman-cross

2 A No way of knowing at all, But if it were from cur-  
3 rent activity, I would be aware of it.

4 I am not totally sure that this is an adequate  
5 description of that amount.

6 THE COURT: The amount isn't in evidence so it is  
7 all right.

8 Q Mr. Shulman, I would like you to assume that ASCAP  
9 and BMI were enjoined from licensing television networks and  
10 I would like your opinion, sir, as to whether that would  
11 be good or bad for your company.

12 A That would be bad.

13 Q Could you tell us why?

14 A Because it would impose a huge burden on myself  
15 as the publisher in dealing with my performing rights in-  
16 come.

17 I also think it would be bad from the point of view  
18 of the user.

19 Q I didn't ask that, sir. I want you to talk about  
20 your own company.

21 A Yes, I think --

22 Q Are there any other reasons?

23 A Are there any other reasons?

24 Q Yes.

25 A Can I have the question back again because I thought

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2 it was --

3 Q Assume that ASCAP and BMI are enjoined from  
4 licensing television networks. You had said that that was  
5 bad from the standpoint of your company. I was ask you  
6 why. You had given me one reason and I would like now  
7 for you to give me any other reasons that occur to you.

8 A Well, it is such a radical departure from the  
9 business environment that I have functioned in that it seems  
10 to me that it really goes to the roots of any kind of licen-  
11 sing of large numbers of users and it would make the burden  
12 on me as an individual publisher huge if I had to deal  
13 with every individual radio station, television network,  
14 television -- local television station, cabaret, dentist's  
15 office, et cetera. It would be an incredible burden.

16 Q Of course, the facts I asked you to assume were  
17 that ASCAP and BMI were licensing -- were enjoined from  
18 licensing television networks. Networks.

19 A Then it is limited to -- it still is a huge  
20 departure.

21 Q And it is still bad?

22 A Pardon?

23 Q And it is still bad from the standpoint of your  
24 company?

25 A Well, by bad, it would make my -- it would make our

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2 operation less conveneint and more difficult than it pre-  
3 sently is, yes.

4 Q Now you have given me all the reasons why you  
5 personally would prefer that this assumed set of facts  
6 does not become reality?

7 A With the limited time that I have had to think  
8 about it, yes, I think I have.

9 Q Now I would like you to ~~ask~~ me that the CBS  
10 Television Network were suddenly to cancel its ASCAP and BMI  
11 licenses and that the other two television networks, commer-  
12 cial television networks, NBC and ABC retained their  
13 ASCAP and BMI licenses.

14 Would you regard that situation as good or bad  
15 from the standpoint of your company?

16 A Well, it would be one-third as bad as the other  
17 situation. But it would still be difficult, I think.

18 Q And you would hope under those circumstances that  
19 CTN would see the light and go back to ASCAP and continue  
20 under the blanket license system?

21 A Yes.

22 Q Let me ask you this, Mr. Shulman: Are you con-  
23 cerned in direct licensing, the possibility of direct  
24 licensing with a television network about the bargaining  
25 power of the television network?

2 A Yes, I think that that would pose -- yes, that  
3 would be a matter of concern to me.

4 Q Do you think in dealing with the producer of a  
5 television program, and by the way, you mentioned before  
6 Bob Wright of the Carol Burnet show, do you think in dealing  
7 with Mr. Wright in a direct licensing situation, that you  
8 would be at Mr. Wright's mercy?

9 A In what respect?

10 Q IN any respect you can think of.

11 A Well, I would be -- I am presently at his mercy in  
12 the sense that he can pick and choose whatever songs he wants  
13 to use on his network -- on his program. And I would be in the  
14 same position under a direct licensing situation. But it is  
15 hard for me to answer that question, your Honor.

16 THE COURT: All these hypothetical questions have  
17 their difficulties, but it is important for the Court to  
18 get as much solid thinking on the subject as we can from  
19 witnesses who have experience in the field like yourself.

20 I would like to ask you this: You may have  
21 answered it in your last answer but I want to be sure.

22 Do you believe that you would be -- that the results  
23 of your negotiations with regard to music used on a variety  
24 show on television, let us say, would be any less favorable

1 lzbr 7 Shulman-cross

2 or any more favorable or do you believe it would be the same  
3 if you negotiated directly with the producer instead of the  
4 present system?

5 THE WITNESS: Even that is difficult too. I don't  
6 know. It would depend on the individual situation.  
7 I might be able to do better on a direct license in a par-  
8 ticular instance than I would in another. It is very  
9 difficult to answer that hypothetically. I hope that  
10 answered you.

11 MR. HRUSKA: I wonder, your Honor, whether we  
12 could take a very brief break. I think I am at the end.

13 THE COURT: Why don't you check now. I would  
14 like to keep going a little longer.

15 MR. HRUSKA: We have no further cross examination  
16 of Mr. Shulman, your Honor.

17 THE COURT: Any other questions?

18 MR. BLUMSTEIN: Your Honor, I neglected to  
19 offer AX293 in evidence. The standard form of agreement.

20 THE COURT: Any objections to AX whatever it is,  
21 Mr. Hruska? The form agreement.

22 MR. HRUSKA: I am afraid, your Honor, we did not  
23 read it during lunch. We had so many other things to do.

24 THE COURT: What could be objectionable?  
25 It seems to me it is admissible for what it is, whether

2 we like its terms or not.

3 MR. HRUSKA: I agree.

4 THE COURT: All right, it is received in evidence.

5 What is the number?

6 MR. BLUMSTEIN: AX 293, your Honor.

7 (Defendant's Exhibit AX293 was received in  
8 evidence.)

9 MR. BLUMSTEIN: I would also like to offer in  
10 evidence, 3MPX 166.

11 THE COURT: It is in evidence.

12 REDIRECT EXAMINATION

13 BY MR.BLUMSTEIN:

14 Q Mr. Shulman, let me show you that particular  
15 document. You have seen that document?

16 A Yes.

17 Q Mr. Shulman, in February of 1966 there was some  
18 further discussions with 3M concerning a proposed license?

19 A In February of 1966?

20 Yes.

21 Q And at that time how many songs were you talking  
22 about?

23 A 12 or 15 to my recollection.

24 MR. BLUMBERG: Thank you. I have no further  
25 questions.

2 MR. HRUSKA: No recross, your Honor.

3 THE COURT: Thank you very much, Mr. Shulman.

4 (Witness excused.)

5 MR. COLLINS: Your Honor, if we could consider  
6 the plaintiff's offer of documents.

7 THE COURT: Yes, where would be the easiest to do  
8 this, here or in the robing room?

9 Are we going to need to look at the documents  
10 themselves?

11 MR. TOPKIS: I would doubt it, your Honor.  
12 I think it might be more convenient to do it here because  
13 frankly my brains are clustered around me.

14 MR. COLLINS: And my documents are clustered  
15 around me too.

16 MR. TOPKIS: That is called l on l.

17 THE COURT: I don't have a copy of that with me,  
18 of that letter that you wrote. It is necessary for me  
19 to have it.

20 MR. COLLINS: I can hand one up to you.

21 Your Honor, as the procedure we agreed upon at the  
22 close of our session last May was that we would write to  
23 ASCAP and BMI notifying them of the documents we planned to  
24 offer in evidence. And we did write them that letter on  
25 June 22nd and received BMI's reply of July 24th and ASCAP's

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2 on November 13th. I think there are some documents that  
3 we can handle in groups by the nature of the objections that  
4 were made. I plan to do it that way. Also in cases where we  
5 are offering portions of documents, I would suggest that it might  
6 be appropriate to proceed by just reading the number of the  
7 documents, giving to the court reporter that letter so he  
8 can copy in the page and line designations.

9 THE COURT: You are referring to your own letter?

10 MR. COLLINS: Yes.

11 THE COURT: Except what do we do about instances  
12 in which there are objections?

13 MR. COLLINS: Perhaps we could handle those when we  
14 get to that group of documents.

15 I think I would first like to offer in evidence  
16 the depositions which are listed in our letter and I think  
17 I will read the names of the depositions individually, the  
18 deposition that was taken, and the PX number to be assigned  
19 to each deposition.

20 We would offer into evidence the depositions, portions  
21 of the depositions of Stanley Adams, PX 250, Al Brackman,  
22 PX 251, Leon Brettler, PX 252.

23 THE COURT: Now, for instance, these are the  
24 portions indicated on page 15 of your letter of --

25 MR. COLLINS: 15 through --

2 THE COURT: Well, I mean those three are  
3 mentioned on page 15. The rest will be on the pages in-  
4 dicated?

5 MR. COLLINS: Right.

6 THE COURT: All right, proceed.

7 MR. COLLINS: Francis Burkhart, PX 253. Salvatore  
8 Chiantia, PX 254.

9 Cy Coleman, PX 255.

10 Paul Fagan, PX 256.

11 Herman Finklestein, PX 237.

12 Helmut Guttenberg, PX 258.

13 Sid Herman, PX 259.

14 Paul Mark, PX 260.

15 John Mc Laughlin, PX 261.

16 And John McLaughlin, Vincent Vazzana and William  
17 Barrett whose depositions were taken simultaneously, your  
18 Honor, PX 262.

19 MR. TOPKIS: As to these, your Honr --

20 THE COURT: There are a few more. We might  
21 as well specify.

22 MR. TOPKIS: I am sorry.

23 MR. COLLINS: Edwin Morris, PX 263.

24 Mark Shafer, PX 264. Ned Washington, PX 265.

25 Philip Wattenberg, PX 266 and Julian Weissgold,

2 PX 267. And again, in each case the page and line design-  
3 nations are in my letter of June 22nd which I will give to the  
4 reporter.

5 MR. TOPKIS: As to these, your Honor, the only  
6 objection that we have is really designed to save your  
7 Honor's eyesight. Mr. Chiantia just finished testifying.  
8 He was cross examined. I think we can all agree at length.  
9 Why we have to have his deposition as well escape me.

10 Mr. Mark testified I think for three days back in  
11 late May or June and he was most extensively cross examined.  
12 Mr. Finkelstein will testify and if luck is with us, he  
13 will be cross examined extensively too.

14 So why do we have to go through this duplicatory  
15 procedure.

16 THE COURT: With regard to major witnesses like  
17 Mr. Chiantia or Mr. Finkelstein, I agree that in general  
18 the principle of duplication should not be observed.  
19 And what I propose to do, as I indicated this morning, is this  
20 In cases where those people have testified at length, I  
21 will not expect to read their depositions. I am perfectly  
22 agreeable to having them part of the record and having  
23 you point out to me in any post-trial memorandum, any  
24 material that you wish from those depositions which adds  
25 something to the testimony that is in the record.

2 To that extent, it doesn't seem to me terribly important,  
3 important enough to argue about it. You know it is there  
4 and you can counter what he has to say or you can say it  
5 doesn't add anything.

6 MR. TOPKIS: All right.

7 THE COURT: Admitted under that understanding.

8 MR. TOPKIS: We have counter designations on all  
9 of these. Whether you want them offered or subsequently,  
10 I don't care.

11 THE COURT: Yes, I suppose --

12 MR. TOPKIS: I think the easy thing may be this,  
13 your Honor, and that is not to fool around with desig-  
14 nations and counter designations. Any witness whose  
15 deposition they want received by your Honor, I am content to  
16 have received.

17 MR. COLLINS: Well, Mr. Topkis, there are a  
18 lot of things in here we don't think necessary to put in.

19 MR. TOPKIS: I only noticed about three  
20 omissions in the whole thing.

21 THE COURT: As long as you have all gone to the  
22 trouble of specifying carefully what you do have in mind,  
23 why not follow that method.

24 MR. TOPKIS: May we then lodge with the  
25 clerk rather than burden the record on your counter

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2 designations?

3 THE COURT: Yes. You may.

4 MR. COLLINS: We would object to the offer at  
5 this time, your honor. We have not had a chance to review  
6 Mr. Topkis's offer.

7 THE COURT: When was the offer sent?

8 MR. TOPKIS: Several months ago.

9 MR. COLLINS: As I understand it, when we did  
10 our designations here and there were some changes from the  
11 designations that had been made before, Mr. Topkis and his  
12 associates agreed to submit to us a new list of their  
13 designations. To my knowledge we have not received that list

14 MR. TOPKIS: Maybe we have only given three lists.  
15 We will prepare a fourth.

16 THE COURT: If what Mr. Topkis is saying they still  
17 want to put in what they asked for in the first place,  
18 then that is your new list.

19 MR. COLLINS: Your Honor, we do have some objections  
20 to those. We are not prepared to make all the objections  
21 now.

22 MR. TOPKIS: Your Honor, you can have it either one  
23 way or the other. Let us do it in some simple way  
24 and not waste time this way. I will either take all the  
25 depositions in the case and your Honor knows the hearsay

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2 rule and you know ever other rule of evidence. And

3 I will trust blind your rulings on it.

4 MR. COLLINS: I don't believe it is necessary if we  
5 could have a day or two to review our list. We have our  
6 objections prepared. At this point we are not prepared to  
7 proceed with our objections to ASCAP's counter designations  
8 but they are prepared and we will be in a position to do it  
9 tomorrow.

10 THE COURT: I will admit the ASCAP proposal  
11 subject to my ruling on your objections.

12 MR. COLLINS: Could we ask Mr. Topkis to send us  
13 a copy of what he now has?

14 MR. TOPKIS: Instantly.

15 THE COURT: Where do we go from here? What is  
16 your position on these depositions, Miss Kearse? Shall I just  
17 rest happy unless I see you stand up?

18 MISS KEARSE: Too late, your Honor. We sent your  
19 Honor a letter, I believe the date was July 17th, objecting  
20 to it, all of the depositions except for four specific ones  
21 on the grounds they are not admissible against PMI. The  
22 four that were excepted were depositions of BMI employees  
23 and those we object to on the grounds of relevance. The  
24 four BMI employees being Messrs. Burkhart, Guttenberg,  
25 Shafer and Weissgold.

2 MR. HANSEN: My name is Hansen. I took those  
3 depositions, your Honor. They are all BMI computer per-  
4 sonnel. Their positions were taken as foundation to the  
5 testimony of Professor Southworth and Mr. Kaplan.  
6 Indeed, when Professor Southworth after describing his at-  
7 tendance at those depositions was about to describe the  
8 BMI system, Miss Kearsse objected and I quote, "Your Honor,  
9 I object to opinions which are based on descriptions of the  
10 BMI system which are not in evidence. I think the depositions  
11 should be put in evidence if they intend to be relayed on.

12 "I said 'we intended to put them in evidence'  
13 and that is the offer we are making now."

14 MISS KEARSE: I did not intend to waive any  
15 objection to the relevance of what was sought to be intro-  
16 duced.

17 THE COURT: If they are being offered for the  
18 purpose of relating to the testimony of Dr. Southworth, I will  
19 receive them for that limited purpose. Does CBS agree with  
20 Miss Kearsse's objection as to the other depositions, that is,  
21 that they are not binding on BMI except by virtue of the overall  
22 stipulation?

23 MR. COLLINS: Yes.

24 MR. HRUSKA: On that bypass question to which the  
25 stipulation relates, yes, your Honor. Obviously these

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depositions go into other subjects.

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THE COURT: They are not directly binding. They  
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may be indirectly binding.

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MR. HRUŠKA: Through the stipulation, right.

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THE COURT: Very good. They are received subject  
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to BMI's -- well, to their -- subject to their not being  
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binding on BMI except as we have just discussed.

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Mr. COLLINS: I would then offer a group of  
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documents as to which neither ASCAP nor BMI has stated  
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any objection in their letter.

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THE COURT: Hurry up.

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MR. COLLINS: I will read them as quickly as  
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possible. PX 162, 433, 434, 441, 450, 451, 452, 453, 456,  
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458, 509, 510, 511, 513, 579 and 580.

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THE COURT: Am I to understand that those  
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exhibits are found in the first three pages of your letter  
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and happen to be exhibits listed hither and yon in those first  
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three pages that are not objected to?

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MR. COLLINS: They are documents which are listed  
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in the letter. Some of those documents may not have been  
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given PX numbers in the letter. If you would like to,  
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I have a copy of them here to be marked.

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THE COURT: I have a copy of the letter before  
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me.

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MISS KEARSE: Your Honor, we set forth a list of the documents to which we had no objection. I am not sure that -- I see five of the numbers that Mr. Collins has read in that first paragraph. I am not sure what the numbers in the 400 series are.

MR. COLLINS: I did give you a list, Miss Kearse, this morning, of those numbers.

MISS KEARSE: We have made objections to the documents that were submitted to us in the letter of June 22nd. If we have a new list of numbers, I really don't know what those numbers relate to in terms of the documents that were specified in the June 22nd letter. I did the best I could with what I had then.

THE COURT: I am confused about this myself.  
I thought that I was only having to rule on material  
specified in the June 22nd letter.

MR. COLLINS: That is correct. Some of those documents are listed by description rather than by PX number.

THE COURT: For example?

MR. COLLINS: Answers to interrogatories basically.

THE COURT: How can any of us know whether you are right or wrong?

MR. COLLINS: I have given ASCAP and BMI both

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2 copies of my letters with the exhibit numbers in front of  
3 those documents in there described by what they are.

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UNITED STATES COURT HOUSE  
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THE COURT: All right. I can only say at this time, to avoid taking the time for them to inspect those lists and see that they described the items which you specified, and that they have no objection to those or haven't expressed any objection, to save that time now I will admit the exhibits which you have proposed subject to their bringing to my attention that some of them or any of them are, indeed, items that they have previously objected to.

MR. COLLINS: That's fine. I did send copies of these --

MR. HEATHER: And I discussed this last night and they also had a copy of them this morning --

THE COURT: I believe it would take time to look this over to be sure it's correct.

MR. COLLINS: The next group of documents to be offered into evidence are documents as to which ASCAP does not object but as to which BMI objects on the ground that they are inadmissible against BMI and, in some cases, that they are irrelevant or not authenticated.

THE COURT: Of course, the latter presents separate problems from the former. I mean, the question of whether something is relevant presents me with a different problem to decide than whether or not it is binding.

If it is not binding, I can simply admit it subject to its not being binding, unless you claim it is.

MR. COLLINS: Again I think that the ground rule in connection with the BMI-CBS stipulation is appropriate. Certainly I don't want to admit a document that says ASCAP has 20,000 members, to prove that BMI has 20,000 members.

THE COURT: I understand that. I am trying to classify these things so that I can deal with them and there seems to be no real problem about these documents which BMI says are not binding on it. We all know what we are saying there and what the rules are but you say that the group you are now about to read to me not only includes such items as that, but also includes items which BMI says are not even relevant and, therefore, are not admissible.

Now, I can't make any blanket ruling with regard to those. It seems to me I will have to look at items where they claim they are not relevant or have some description --

MR. COLLINS: These are ASCAP documents, your Honor, that we received from ASCAP in document production.

I could at this time just go into the documents as to which the objection is that they are not admissible.

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4 THE COURT: I don't want to hold anything  
5 up that doesn't need to be held up.

6 When you made an objection to a document as  
7 not being binding on BMI, or relevant, Miss Kearse,  
8 without meaning to minimize that you meant what you said,  
9 were the claims of relevance such that you want the Court  
to review the documents and make a ruling on them or were  
they --

10 MISS KEARSE: Yes, your Honor. We had a  
11 category of documents which we think are irrelevant. We  
12 had another category as to which we thought they were  
13 inadmissible against BMI. We had another category which  
14 were both irrelevant and inadmissible against BMI and a  
15 number of other categories of objectionable documents.

16 THE COURT: Well, I don't see how I can simply

17 MR. COLLINS: Perhaps then the best way to  
18 proceed is to go through the documents one by one. I  
19 don't know how else to do it, really.

20 THE COURT: I think we are going to have to  
21 admit at the present time everything that is admissible.  
22 We are going to have to segregate the items which BMI  
23 claims, such as I now see on page 2 of its letter of  
24 July 24, paragraph 1B, BMI objects to the following documents  
25 on the grounds that such documents are irrelevant

to this proceeding.

Your surprised tone that I might be required to look at these one by one surprises me. How else could I rule on this?

MR. COLLINS: I understand that, your Honor. I was just trying to find a way to save time.

THE COURT: The only way to do it is at the expense of BMI, which has a right to ask me to rule.

We will bypass the objections relating to relevance or the documents that are referred to in such categories and we will have to take some time, as soon as we can, to go over the relevance, but it will then, I think, be best for Miss Kearse to specify what her objections to relevance are.

I assume they are in groups of some kind or other. I hope that they are in groups and, if they are not, we will have to go through them one by one and see.

MISS KEARSE: As I recall, some of these documents are allover the lot and it would be hard to put one group with another in some cases. I am interested in not loading up this record with a lot of irrelevant documents and I think that if we keep the irrelevant documents out, it will shorten the case that we want to present later and we are going to have to, from my point of view --

THE COURT: That may be true, although sometimes I think we spend more time trying to save time than we gain by it.

I don't know what you want me to do. Let's take paragraph 1B on page 2. There are 25 exhibits there that you refer to. On neither side can I simply say you are right or you are right.

MISS KEARSE: I think that is obviously correct, your Honor. You will have to rule on each, individually.

THE COURT: Correct. So, what I am saying is that we will put them aside as of today in the sense that I will not admit them at this time and we will have to take some time out for us to review these and at that time I will expect you to be prepared to let me know what it is that is on your mind about these documents and to the extent that it is possible, that is, where objections are general, to express the general objection and see whether I agree with it or I don't.

MR. COLLINS: Your Honor, could I suggest that as to these documents I give Miss Kearse and Mr. Topkis a list of the documents which I would propose to introduce in this group and then ask that perhaps in that manner they could respond as to which documents

Miss Kearse objects to on any ground other than the inadmissibility of the documents against BMI.

MISS KEARSE: We have already specified our objections on each specific document that you had in your June 22 letter. We have given very detailed objections.

THE COURT: I agree. I don't know what more they can do at the present time except to get down to the nitty-gritty on the allegedly irrelevant ones when we come to them.

MR. COLLINS: Could I suggest that we just go through the documents now?

THE COURT: No, I will not do that now. I am trying to get in everything to which there is not an objection. Can't we get that out of the way?

MR. COLLINS: I think that we have already gotten it out of the way.

THE COURT: Then I will be prepared to --

MR. COLLINS: By the way, some of the documents on page 2 that Miss Kearse referred to have already been received in evidence.

THE COURT: Have already what?

MR. HANSEN: In paragraph 1B, those to which BMI objects as to relevance, PK numbers 301 through 325

were all exhibits marked at the depositions of the computer people that we just spoke about and they are offered also as foundation and I think your ruling as to depositions also applies to those and we can dispose of those.

THE COURT: It may or may not. I don't know whether any objection was made at the depositions.

I hope I won't have to go into all of that but if your objection to 301 through 325 was based on the same theory --

MISS KEARSE: The same objection that I have to the others.

THE COURT: And the fact that they weren't even admissible at the deposition, if you follow me, then I agree with plaintiff's counsel that you know they are part and parcel of it and I will admit them for the limited purpose for which I admitted the depositions themselves.

As to all the rest of the exhibits there is an objection one way or the other, is that right?

MR. COLLINS: Yes, and some of those we don't have to go through.

THE COURT: Sounds like all of them we have to go through.

I was going to suggest this: it's one thing to sit up here on the bench and rule on general propositions. When we get to the question of dealing with specific documents, it is going to be very clumsy for me to be constantly passing these things back and forth and I think, either in the robing room or my chambers, it will be a lot easier to cope with the problem.

MR. HRUSKA: Your Honor, I think that this problem looks a lot worse prospectively than it will actually be and the reason I think that is so is, probably, if we went through 15 or 20 of these documents, the rulings made on those documents would probably have general applicability to all the rest and all the rest could be gone through in relatively fast time.

MR. COLLINS: For example, the document on the top is the blanket network license between ASCAP and CBS, 1958 license. BMI has objected to that document being introduced.

I think there are a lot that if we simply go through this pile that we can resolve the question.

THE COURT: I am aware that that will have to be done. The reason I was so firm about it a moment ago was because I was under the impression at that time that there were other documents to which there were no

2 objections but now you tell me there are not.

3 Yesterday in the robing room it was said to  
4 me here were categories of documents with regard to  
5 which objections were made. It seems to me that is  
6 the basis of an argument and I will agree with one side  
7 or the other or neither, perhaps, but make a ruling.

8 On the other hand, I take it that there are  
9 some documents which I may have to look at in order to  
10 make a ruling and, if I have to look at them, it is not  
11 very easy to do it right here.

12 So, we don't we take the categories of docu-  
13 ments to begin with, and see what we get rid of and then  
14 I'll work out some procedure for those that are left to  
15 examine them or discuss them in a more comfortable place.

16 MR. COLLINS: There is one other category  
17 that I have and perhaps we can dispose of it, and these  
18 are documents as to which ASCAP objects unless admissible  
19 portions of the documents or other documents are received  
20 in evidence and BMI objects to these documents on the  
21 grounds that these are inadmissible. These are mostly  
22 ASCAP documents, briefs, affidavits, trial testimony,  
23 depositions, material of that nature.

24 THE COURT: What is your point?

25 MR. COLLINS: I would offer them in evidence

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2 and I would like to offer just the portions that we have  
3 designated. Again, I realize that by putting a document  
4 in evidence, that we are not bound by everything that is  
5 said in the document, but I do believe it's unnecessary  
6 to put in a lot of material that is not particularly  
7 germane to this lawsuit.

8 THE COURT: Well, I get the feeling that we  
9 are all being terribly artificial about these points.  
10 Maybe I am wrong about it, but it seems to me that it  
11 would be possible for all of the material, if that would  
12 be easier for us all in order to cope with the situation,  
13 to be made part of the record in the sense that it is  
14 available for presentation for argument to the judge  
15 and that nobody needs to be bound by that.

16 If you wish to put in what you want all  
17 right, and let ASCAP put in what it wants.

18 MR. COLLINS: That is fine. I just don't see  
19 the necessity for cluttering it up but, if ASCAP wants to  
20 put something in that is admissible --

21 THE COURT: Of course, what is one man's  
22 clutter is another man's bible. Unless I sit down and  
23 literally determine each one of these contingents, which  
24 would take an indescribable amount of time, I think the  
25 simplest way is to say here, there is a fund of material,

2 anybody can draw on it. If you can persuade the judge  
3 or the Court of Appeals that it has something to do with  
4 the case, okay; if you can't, tough.

5 MISS KEARSE: I just want to state for the  
6 record, your Honor, my objection to that. I think that  
7 we should proceed in the normal way to get only  
8 admissible documents and so forth into the record. I  
9 think that your Honor is being invited into error to have  
10 this bulk of material, much of which is totally  
11 irrelevant, into the record and to have it there for  
12 anybody to just draw on and throw it in whenever it seems  
13 desirable to do so.

14 I don't think that is really the way to  
15 proceed.

16 THE COURT: Then, gentlemen and ladies, I  
17 am going to call a halt now and each of you submit a  
18 brief specifying what your objection is to each document  
19 and plaintiffs can answer that and I will read it over  
20 and decide. I am not going to sit here and quibble about  
21 this indefinitely.

22 If these things are important to you, tell  
23 me why you object to these things.

24 MR. COLLINS: BMI did not object to these  
25 documents on the ground that they were irrelevant. They

objected to them on the grounds that they were inadmissible.

THE COURT: I am not sure. There has to be a ground for being inadmissible. I can understand that it will help, up to a certain point, for you to exchange these letters and say that this is what I want to do and this is what I object to, but it's impossible for me to be able to rule on that basis.

MR. TOPKIS: Your Honor, could I interject a word, having sat quiet for, oh, perhaps for more than usual?

We are talking now, I gather, about material to which ASCAP objected unless certain additional material was offered and, just by way of example, just so that you may focus in on it and not talk about abstractions, there was a case called Cas cascade against ASCAP, tried in Yakima County Courthouse, Yakima County, Washington, and it went on for endless years and Herman Finkelstein went there, and I was there and Herman Finkelstein was there most of the time. He testified at unbelievable lengths.

THE COURT: There?

MR. TOPKIS: There. Other places, but Yakima too.

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2 THE COURT: You mean what he said was  
3 unbelievable?

4 MR. TOPKIS: It's length was unbelievable.

5 My friends want to introduce of that testi-  
6 mony the cover page and page 841 and also page 798 of  
7 the Cascade trial transcript and page 789, line 24 to  
8 page 790, line 23.

9 I haven't a clue as to why they want those  
10 three snippets and, so help me God, I don't know why I  
11 should be bothered to read the whole Finkelstein trans-  
12 cript to figure out what other comments he may have had  
13 on the same subject.

14 My response is, if you want to stick in those  
15 three lousy pages, take the whole bundle, take all the  
16 Finkelstein material and, as your Honor says, either  
17 side can then draw on it. At least, then, I will have  
18 the comfort of knowing I have got the whole Finkelstein,  
19 Yakima -- Cascade story, so that if they have twisted  
20 in some way or seek to, I have the rest of it to go on.

21 THE COURT: There is one other way to do this.  
22 Let's go off the record for a minute.

23 (Discussion off the record.)

24 (Continued on next page.)

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THE COURT: Let us start by going through the list  
of BMI objections and having Miss Kearse express to me what  
those objections are because that is not made clear from her  
letter, however good her letter is, and then Mr. Hruska  
or his colleagues can justify it, attempt to justify the  
admissibility and then I will rule.

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MR. HRUSKA: Your Honor, I think last night Mr. Baker  
and Mr. Collins went through all these documents and put them  
in certain subject matter groupings and if we could go  
through the documents in that sequence, I think the way this  
has been designed, we would get through it a lot faster.

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THE COURT: I just want to be sure that I have  
covered everything as it is set forth in the letters.

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MR. HRUSKA: I think you know the objections to each  
of the documents. And Mr. Baker has one separate category,  
I think, which is distinct, it consists of 35 documents.  
I think we can deal with them in about thirty seconds.

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Maybe we ought to get rid of those first.

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THE COURT: What are they?

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3 to BMI only to the extent they are incorporated in the  
stipulation.

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4 THE COURT: I understand from an earlier discussion  
5 this afternoon which may not have been on the record because  
6 we were off the record for a while, that Miss Kearse's  
7 objection is satisfied by that statement. Is that correct?  
8 That is, that these documents, and their numbers will be  
9 read, of course, are among documents which you have  
10 claimed are not binding on BMI, and if Mr. Baker's state-  
11 ment indicates or should be construed to mean that CBS  
12 doesn't claim that they are binding on BMI except by virtue  
13 of whatever stipulations have been entered by the parties.

14 MISS KEARSE: Yes, your Honor, we are only bound by  
15 that stipulation and to the extent that that stipulation means  
16 that those -- or to the extent there is any relationship of  
17 these documents to that issue, then we are affected by  
18 it.

19 THE COURT: All right. Then the documents,  
20 do you want to give their numbers?

21 MR. BAKER: Yes, I can, your Honor.

22 Maybe it would be easier if I gave the reporter  
23 the list I gave ASCAP.

24 THE COURT: It will be admitted on the conditions  
25 just indicated. Any document included in the list which

2 is already in evidence, obviously, is not reintroduced.

3 THE COURT: Where do we go from here?

4 MR. COLLINS: The first document I would offer  
5 is PX 35 which is part of the transcript in Cascade  
6 litigation. I want to offer a statement --

7 THE COURT: I think you have to handle this one  
8 way or the other. Either I have to take all of BMI's  
9 objections and rule on them or ASCAP's objections and rule on  
10 them. We just dealt with objections by BMI. It gets me  
11 very confused when I keep jumping from one category to the  
12 other. Wouldn't the most effective way to proceed here  
13 would be for me and all of us to go down the lists of  
14 objections as specified in the letters of the defendants and  
15 have them explain what their objections are, unless you  
16 already know, and have you tell me why you think these wrong  
17 and then have me rule.

18 MISS KEARSE: I think actually, your Honor,  
19 the best way, the most expeditious way is to deal with the  
20 document by document and if either of us have an objection,  
21 you will only have to look at the document once.

22 THE COURT: It surprises me but if you agree,  
23 that is fine with me.

24 MISS KEARSE: Also, the list that was just  
25 given to the reporter to copy is not the list of documents

2 to which our only objection was that the documents were not  
3 binding on BMI.

4 MR. BAKER: What were the --

5 MISS KEARSE: For instance, 3MPX136 was objected to  
6 on the grounds that it was irrelevant as well as inadmiss-  
7 ible against BMI. And I can just see at a glance that your  
8 list --

9 MR. HRUSKA: Let us take one at a time.

10 3MPX136?

11 MISS KEARSE: Yes.

12 MR. HRUSKA: Here you have an objection that  
13 goes beyond the stipulation point?

14 MISS KEARSE: Yes, we objected on the grounds it  
15 was irrelevant.

16 MR. HRUSKA: Why don't you pull out that docu-  
17 ment, 136.

18 MISS KEARSE: This is why I think it is better  
19 to go down them document by document. Let us check our  
20 letters we sent in response to their designation of documents  
21 and tell you what our objections were to the specific --

22 THE COURT: That is what I said.

23 MISS KEARSE: I think we should do it for both  
24 defendants. It will save you from having to look at a  
25 document twice.

2 THE COURT: We will have to choose somebody's  
3 as a base here. Whose letter will we start with?

4 MISS KEARSE: CBS.

5 THE COURT: You mean the defendants will express  
6 their objections as we go along?

7 MR. COLLINS: I would prefer to go through it  
8 by subject categories. That is the way I have prepared  
9 to go through them and I think if we talk about a subject,  
10 we will be able to handle the documents more quickly.

11 THE COURT: It makes it more difficult for the  
12 defendants because they don't know --

13 MR. HRUSKA: Which category their objection  
14 is in.

15 THE COURT: They have organized their material  
16 in a particular fashion.

17 MISS KEARSE: We have organized it to follow  
18 the letter that was sent to us designating the documents.

19 MR. COLLINS: You have them in numerical order.

20 MR. HRUSKA: Don't we have a spread sheet --

21 THE COURT: Let us go off the record.

22 (Discussion off the record.)

23 THE COURT: I am instructing the reporter not to  
24 copy into the record the list previously referred to of  
25 exhibits until Miss Kearse and Mr. Hruska have conferred

2 and have agreed as to the -- what revisions are necessary.

3 MR. COLLINS: 35 is a portion of the testimony  
4 given in the Cascade litigation --

5 THE COURT: Wait a minute. We have some ASCAP  
6 representative over here.

7 MR. TOPKIS: I am here.

8 It was even my copy of the list that you used.

9 THE COURT: Would you go ahead, please.

10 MR. COLLINS: A portion of the trial testimony  
11 in Cascade Broadcasting against ASCAP in the State of  
12 Washington. Testimony given by Mr. Gyenes as to the  
13 number of works in the ASCAP performed index. ASCAP  
14 has no objection to the document and BMI objects to the  
15 document on the grounds that it is inadmissible.

16 MISS KEARSE: It is not binding on BMI.

17 THE COURT: Subject to reservation that it is  
18 not binding on BMI, it is admitted.

19 As to PX 35, Mr. Topkis now says he inadvertently  
20 neglected to object. What is the objection?

21 MR. TOPKIS: It is a portion of testimony by  
22 a statistician/computer expert named Andy Gyenes who  
23 testified in the Yakima trial about what was in the  
24 ASCAP repertory. He is not an ASCAP employee. His state-  
25 ments are not binding upon us. I believe them to be

2 erroneous and I don't want to have them hung around my  
3 neck.

4 THE COURT: Do you want to answer that?

5 MR. COLLINS: Well, we do have another state-  
6 ment in the record as to the size of the performed works  
7 index.

8 MR. TOPKIS: Index or repertory?

9 MR. COLLINS: Index.

10 MR. TOPKIS: The index itself is in evidence.

11 MR. COLLINS: If Mr. Topkis stipulates that that  
12 is the true number, the true size of the performed works  
13 index and that is a document supplied to us by ASCAP in re-  
14 sponse to a request concerning the size of the performed  
15 works index, then we have no -- I would withdraw the offer  
16 of this document.

17 MR. TOPKIS: I don't want to bargain. I don't  
18 know what he is talking about. This document is a bad  
19 document.

20 THECOURT: I will sustain the objection. It  
21 seems to me that the evidence you wish to put before me is  
22 in the record. I don't see how he can contest his own  
23 publication.

24 MR. COLLINS: The next document I would offer is  
25 PX009, which is Mr. Topkis' opening statement in the Cascade

2 litigation and this is a statement which I think is relevant  
3 on the issue of bypass.

4 BMI says it is inadmissible against BMI and ASCAP  
5 objects unless all of Mr. Finkelstein's testimony in Cascade  
6 is also received.

7 THE COURT: Well, I understand and sustain BMI's  
8 objection but that doesn't solve the problem. I will  
9 hear from Mr. Topkis as to the nature of his objection.

10 MR. COLLINS: Judge Lasker, that is insofar as it  
11 is not relevant to the question of bypass.

12 THE COURT: Always.

13 Miss Kearse has made it perfectly clear she under-  
14 stands and honors that stipulation.

15 MISS KEARSE: Certainly.

16 MR. TOPKIS: I objected on the ground that  
17 anything that I as trial counsel said is not evidence.  
18 What Mr. Finkelstein said in that case was evidence --

19 THE COURT: I will sustain your objection but  
20 not the condition.

21 MR. TOPKIS: Fine.

22 THE COURT: I don't see an attorney's statement  
23 is binding as evidence against his client either and I will  
24 sustain the objection. Unless you bring authority to  
25 my attention that I am wrong on that but I think --

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MR. HRUSKA: I think then we will have to give you a brief on that, your Honor. I think we do feel, I think some research has been done on this, that a statement by counsel --

MR. COLLINS: In open court.

MR. HRUSKA: In open court, made in the course  
of another trial is binding on the client --

THE COURT: I will reserve decision on that point subject to having authority brought to my attention.

MR. TOPKIS: This is my entire opening statement?

MR.COLLINS: The next document I would offer  
is PX 004, which is a portion of the transcript of the hear-  
ing, of a hearing in the United States v ASCAP.

And this is a statement by Mr. Dean who was counsel for ASCAP at that time. I am offering that for the size of the ASCAP repertory.

THE COURT: Haven't we already covered that point by virtue of the fact that the exhibit is agreed to be part of the record?

MR. HRUSKA: The exhibit is the performed works index, your Honor. This statement relates to the repertory, which is larger.

MR. TOPKIS: Joel Dean, ASCAP survey adviser,  
I think his title is, picked up a statement made earlier at

2 the same hearing by one --

3 THE COURT: Are you talking about Joel Dean or  
4 Arthur Dean?

5 MR. TOPKIS: Excuse me, Arthur Dean. Ambassador  
6 Dean. Ambassador Dean picked up a statement that had been  
7 made earlier in the transcript by someone else and referring  
8 to it made a statement which they want to put in. I want  
9 to put in the earlier statement that he was referring to  
10 in the interest of clarity.

11 MR. HRUSKA: We would have no objection to that.

12 THE COURT: It is received on that basis.

13 MR. TOPKIS: So the record is clear, what I want  
14 is the transcript of hearings in the same matter, page 21,  
15 line 13 to page 23 line 7.

16 THE COURT: To get back for a moment to the  
17 statement, to the opening statement of Mr. Topkis, what are  
18 you trying to prove by the introduction of that statement,  
19 what admission on what subject do you claim that has made?

20 MR. COLLINS: He made an admission as to the  
21 difficulty of negotiating with individual copyright owners.

22 MR. TOPKIS: There is no issue about that.

23 It is terribly difficult for radio stations or television  
24 stations to negotiate with individual copyright owners.

25 THE COURT: I will state on the record I have never

understood ASCAP to take any other position than that.

MR. TOPKIS: Of course not. Mr.inkelstein and I have said it dozens of times in dozens of forums.

THE COURT: I think that that statement is sufficient to warrant, regardless of whether it is binding on ASCAP in the past or not, my discretion in stating that it is unnecessary to put that in to complete the record. So I will rule the statement out just because I believe I understand that to be ASCAP's position already.

MR. COLLINS: I think it would be useful to have in the record the ways in which this has been stated. This has been stated very strongly on more than one occasion. Just to say everybody agrees it would be difficult -- perhaps your Honor would like to look at the statement?

MR. TOPKIS: Why don't you take the time, Judge, to read the 50 pages that I --

MR. HRUSKA: I can quote it without looking at it.

Jay said that --

THE COURT: Do I really have to see the whole thing to understand the statement you just made? That is why I asked you, he couldn't have taken 50 pages to say it was difficult to negotiate.

MR. HRUSKA: We don't offer 50 pages. I think

we offer one page and one page for one sentence. The sentence is that no user of music performance rights could possibly hope to communicate with the proprietors of the music that the user wanted to use. That is the substance of the statement.

Jay just made a statement about individual radio stations and television stations. I think the statement in context in the opening statement of the trial had broader application. And that is why we offer it.

MR. TOPKIS: The trial was a trial against television station and as I remember radio stations.

THE COURT: Is this the case, the 91 case?

MR. HRUSKA: It is a similar case and I was talking in that context. Now, if that statement goes in, I will have to get on the witness stand and explain, that is what I was talking about. And I was no more thinking about CTN and how it could function than I was thinking about how Joe's Hamburger stand or Hot Dog stand could function. I was operating in a particular context and that is the very danger of trying to rip these statements out of context. If they want to put me on the stand in this case, I suppose that would be their right.

But I don't see that they have a right to take something that I said in another country, practically --

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THE COURT: I will sustain the objection.

MR. COLLINS: I have an embarrassing thing to say to you, and that is that that was not 009. So I will now introduce what is really 009.

MISS KEARSE: Tell us what that number really was.

MR. COLLINS: It is some other number in my records.

MISS KEARSE: Something has been rejected but we  
don't know what.

MR. COLLINS: Document 009, however, is also a portion of the testimony in the Cascade litigation, this time a portion of Finkelstein's testimony and I am offering this document as a statement of the number of members of foreign societies in response to a question by Mr. Topkis.

THE COURT: It will be much easier for me, it really  
will, this, of course, is related to the discussion that I  
embarked on when I was still on the bench, if you simply  
do ask Mr. Finkelstein how many foreign people there are,  
it may be different today than what it was then by the way,  
and if he doesn't know, show him this to refresh his recol-  
lection. So on that basis, the offer is rejected.

MR. COLLINS: The next document is No. PX 004 which is, again, an -- PX 003, I am sorry, which is, again, a statement by Mr. Dean, again, in a hearing in U.S. v ASCAP

as to the size of the ASCAP repertory.

THE COURT: Let me ask this perhaps naive question. Why should it be an issue of fact as to what the size of the ASCAP repertory is? Is that something that is a questionable matter?

MR. TOPKIS: It is not a relevant matter, I don't think.

THE COURT: That is another matter.

MR. TOPKIS: Nobody knows how many compositions are in the ASCAP repertory.

THE COURT: You don't need the precise number, I take it. You are looking for a score or a range or --

MR. COLLINS: These statements do contain numbers which are much larger than any number ASCAP has ever been willing to give to us as any sort of occasion at the present time as to what the size is and I think they are relevant. They are statements in this case by ASCAP's attorney --

**MR. TORKIS:** That was Ambassador Dean.

MR. HIRSCHKA: Why don't you let him finish.

THE COURT: I understand this Ambassador Dean

MR. COLLINS: I think they do give some control.

to the size of ASCAP.

THE COURT: I must say that the Court wants to be informed one way or another about what the size of the

2 repertory is. I don't mean to say the case turns on it  
3 but I do think that it is relevant and whether that is done --  
4 if it can be done by stipulation, so much the better.

5 If it can't be done by stipulation, then I think the  
6 plaintiff is entitled to put in what proof it can. Subject  
7 to the question of -- which I raised before, whether counsel's  
8 statement is admissible evidence, I will accept it.

9 You don't have to write a memorandum. Just give me a couple  
10 of cases about counsel's statement.

11 MR. TOPKIS: Which one are we talking about now?

12 MR. COLLINS: 003.

13 ASCAP only -- by the way, the statement of  
14 Mr. Topkis is PX11.

15 THE COURT: That is the one that has been rejected.

16 MR. HRUSKA: Right.

17 MR. COLLINS: The next document I want to offer  
18 is ASCAP advertisement, PX029. 1972 ASCAP advertisement  
19 which, again, states the size of the ASCAP repertory and I  
20 would offer it for that.

21 MISS KEARSE: Is Mr. Collins -- are you giving --

22 MR. COLLINS: BMI says that it is inadmissible  
23 against it and again, of course, I am not going to contend  
24 that the size stated for the ASCAP repertory is the size  
25 of the BMI repertory.

2  
3 THE COURT: The same ruling as before with regard  
4 to items which BMI claims are not admissible against it.  
5 It is admitted subject to the reservation expressed before.

6  
7 MR. COLLINS: The next document I would offer  
8 is Exhibit 402 which is from ASCAP's answers to interrogatories,  
9 a chart which shows the number of ASCAP members  
between 1950 and 1969. ASCAP has no objection. BMI says  
it is inadmissible against it.

10  
11 THE COURT: Gentlemen, I am sorry to interrupt  
12 you just when we seem to be making progress for the first  
13 time but unfortunately it is 4:30 and I have another hearing  
14 in my chambers. I was wondering if we could start  
15 at 9:30 tomorrow morning and continue this process until  
16 it is completed.

17  
18 I hope we will get it out of the way quickly and  
maybe when we are fresher we will do it more quicker.

19  
20 MR. TOPKIS: Can I inquire as to when I can have  
my witness available tomorrow?

21  
22 THE COURT: Your guess is as good as mine. I would  
say it sounds to me as if it is going to take at least an  
hour.

23  
24 MR. COLLINS: Or two. I think we probably can do  
it -- an hour, an hour and a half.

25 (Adjourned to November 28, 1973, at 9:30 a.m.)

## PORTIONS OF DEPOSITIONS RECEIVED IN EVIDENCE

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Leon Brettler

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page 334 line 24-25  
page 335 line 4--page 336 line 4  
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page 339 line 17--page 340 line 25  
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page 362 line 8--page 365 line 12  
page 366 line 15-23  
page 368 line 8-11  
page 368 line 19--page 372 line 14  
page 372 line 20--page 373 line 15  
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page 532 line 8--page 539 line 7  
page 553 line 25--page 555 line 8  
page 555 line 15--page 557 line 2  
page 557 line 12--page 558 line 13  
page 558 line 22--page 560 line 23  
page 561 line 4--page 563 line 13  
page 565 line 3--page 569 line 17  
page 570 line 24--page 572 line 9  
page 572 line 14--page 576 line 7  
page 577 line 21--page 579 line 21  
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John McLaughlin

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page 23 line 21--page 25 line 4  
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page 110 line 8-19  
page 112 line 21-25  
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John McLaughlin, Vincent Vazzana and William Barrett

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Edwin H. Morris

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page 75 line 23--page 128 line 13  
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Mark E. Shafer

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page 26 line 12--page 30 line 4

Ned Washington

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page	92	line	14--page	100	line 19
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Philip Wattenberg

page	2	line	22--page	34	line 16
page	35	line	23--page	42	line 14

Julian Weissgold

page	3	line	7--page	7	line 16
page	9	line	13--page	27	line 23
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END OF PORTIONS OF DEPOSITIONS RECEIVED IN EVIDENCE

ON NOVEMBER 27, 1973

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LWJAL

November 27, 1973

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<u>PAGE</u>	<u>LINE(S)</u>	<u>ERROR</u>	<u>CHANGE TO</u>
2999	3	Mr.Arrow	Mr. Arrow
3003	14	intersts	interests
3005	12	askin	asking
3006	11	polic	police
3006	20	cassettte	cassette
3007	16	be refrained	refrain
3009	6	insta-lations,	installations,
3009	23	reserve	preserve
3010	10	companies	copyrights
3010	20	intelligent	intelligent,
3010	25	putthis	put this
3012	16-17	why Harry	why the Harry
3013	3,13	3M, 1200	M1200
3013	6	1300	1200
3013	9	n mber	number
3015	2	accordingto	according to
3015	7	Allen	Allan
3015	23	AllenArrow	Allan Arrow
3017	6	cmae	came
3018	10	Is n't	Isn't
3019	22	Allen	Allan
3020	21	furtherquestioning	further questioning
3021	21	Allen	Allan
3022	12	overagain	over again
3022	13	aboutit	about it
3022	16	,is	, is
3023	3	Imean	I mean
3023	14	hereon	here on
3023	15	because my	because of my
3024	18	Youdid	You did

<u>PAGE</u>	<u>LINE</u>	<u>ERROR</u>	<u>CHANGE TO</u>
3024	21	You didn't	You didn't
3025	11	aidferent	a different
3026	4	MR. TOPKISCan't	MR. TOPKIS: Can't
3026	13	rention by	retention of them by
3027	14	wouldhave	would have
3028	11	,wouldn't	, wouldn't
3029	12	be	been
3029	15	deposition	deposition,
3030	15	saud.	said.
3030	20	doone	do one
3030	24	revognizing	recognizing
3032	10	Allen	Allan
3032	11	Allen	Arrow
3032	16	Allen	Arrow
3033	9	Allen	Allan
3033	13	Allen	Allan
3033	17	Allen	Allan
3033	24	Allen	Allan
3034	3	Allen	Allan
3038	15	woul	would
3039	4	inCannes	in Cannes
3040	23	thinkthat	think that
3042	11	arond	around
3044	12	a use	a per use
3045	8	whether MCA	whether the MCA

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<u>PAGE</u>	<u>LINE</u>	<u>ERROR</u>	<u>CHANGE TO</u>
3046	18/19	composition/and	composition./ And
3048	17	a license	a license
3048	20	at least	perhaps
3049	21	The Dating	The Dating
3051	8	night club	nightclub
3052	7	that	about whether
3055	19	raised	raised,
3056	14	you	you've
3057	4	behalf	behave
3058	12	Allen	Allan
3058	13	hav e	have
3058	19	Allen	Allan
3058	23	police	policing
3059	11	aud	said
3061	6	the	The
3061	12	You	He
3061	17, 19	the new	The New
3061	20	game	Game
3062	3	open	up
3062	21	modifying	quantifying
3063	12	frently	frequently
3064	15	Chianti	Chiantia
3064	24	andportions	and portions
3066	13	Forhow	For how
3066	14	bitover	bit over
3067	2	155.	1955.
3067	3	Was	I was

<u>PAGE</u>	<u>LINE</u>	<u>ERROR</u>	<u>CHANGE TO</u>
3068	12	division. Both	division, both
3068	16	as	is as
3068	20	Publsihing	Publishing
3068	24	company	companies
3069	5	deomestic	domestic
3069	21	true is	true and that is
3070	3	broadway	Broadway
3070	16	That is	That is
3071	17	Rachmanoff	Rachmaninoff
	17	Respigi	Respighi
3072	7	Caryle	Carlyle
	8	supplied	slighted
3072	24	seriou	serious
3074	24	jublishing	publishing
3076	4	Iwill	I will
3077	8	yourdealings	your dealings
3078	7	divison	division
3079	15	tht	that
3080	11	then	than
3081	2	connectionwith	connection with
3081	15	of the	of which the
3081	19	a Columbia	Columbia
3081	20	records	Records
3081	21	rate with	rate--with
3082	23	caqn	can
3083	18	very very	very, very
3084	4	are	is

<u>PAGE</u>	<u>LINE</u>	<u>ERROR</u>	<u>CHANGE TO</u>
3085	2	attempt	attempted
3085	21	for,to	for, to
3086	10	up	Up
3087	12	least business	least the business
3087	23	n ot	not
3088	24	music publishers association	Music Publishers Association
3090	14	writer's	writers'
3091	8	CTN they	CTN what they
3092	17	whenyou	when you
3093	7	Allen	Allan
3094	9	policing	policing
3096	2	Allen	Allan
3096	20	Allen	Allan
3099	5	was	were
3101	19	Hogie	Hoagie
3102	8	Hogie	Hoagie
3102	14	,I	, I
3103	3	thanStardust	than Stardust
3103	20	w hose	whose
3103	22	theRichmond	the Richmond
3104	17	J. Mark	J. Mark
3104	21	,1965	, 1965
3104	24	Sheldon	Seldon
3105	5	Sheldon	Seldon
3106	5	Mr.Arrow	Mr. Arrow
3106	10	Allen	Allan

<u>PAGE</u>	<u>LINE</u>	<u>ERROR</u>	<u>CHANGE TO</u>
3108	18	Sheldon	Seldon
3109	5	othose	those
3111	7	Allen	Allan
3111	20	yourecall	you recall
3115	9	,you	, you
3117	9, 14, 15	Richman	Richmond
3118	5, 13	Richman	Richmond
3119	12	Harry Richman	Howie Richmond
3119	16	tha:	that
3119	19	aremembers.	are members.
3119	20	Richman	Richmond
3119	23	don'trecall	don't recall
3119	24	was	were
3121	7	much as	much about
3123	21	anyone	any one
3124	11	dentist's	dentists'
3127	19	Richman	Richmond
3128	3, 9, 23	Richman	Richmond
3128	5	THECOURT	THE COURT
3130	25	eithth	eighth
3131	18	ahy	any
3131	21	43,000	\$43,000
3131	22	know it	know, it
3132	2	But	but
3134	2	conveneint	convenient
3135	10	IN	In
3136	5	difficult too	difficult, too

<u>PAGE</u>	<u>LINE(S)</u>	<u>ERROR</u>	<u>CHANGE TO</u>
3136	9	difficulty	difficult
	14	littlelonger	little longer
3137	24	Blumberg	Blumstein
3137	24	vou	you
3138	7	COURT:Yes	COURT: Yes
3139	5	,I	, I
3140	11	PX 237	PX 257
3140	14	Mark,	Marks,
3140	15	Mc Laughlin	McLaughlin
3141	9	escape	escapes
3141	10	Mark	Marks
3141	19	this	this:
3142	25	on your	with our
3144	21	PMI	BMI
3145	4	positions	depositions
3145	6	Southworth	Southworth,
3145	11	on.	on."
3145	11	relayed	relied
3145	12	"I said 'we	I said, "We
3145	12	evidence'	evidence"
3145	13	now."	now
3146	18	bexhibits	be exhibits
3148	5	speciified	specified
3148	12-13	these-- / MR. HEATHER:	these to Mr. Heather, an-
3151	20	allover	all over
3154	10	301	300
3156	12	So, we	So, why
3159	17	Casecade	Cascade

<u>PAGE</u>	<u>LINE</u>	<u>ERROR</u>	<u>CHANGE TO</u>
3160	4	It's	Its
3160	19	twisted	twisted it
3161	5	Hurska	Hruska
3163	11	fromeone	from one
3163	19	way is	way, is
3163	19	with the	with them
3165	4	CBS.	CPS'.
3165	24	thelist	the list
3167	12	ize	size
3167	20	THECOURT	THE COURT
3169	14	v	v.
3169	24	survay	survey
3170	19	h	he
3171	17	ti . . . tge	to . . . the
3172	3	thatno	that no
3172	12	station	stations
3172	13	91	K91
3172	14	MR. HRUSKA:	MR. TOPKIS:
3173	25	v	v.
3174	16	as	on
3174	21	this Ambassador	this is Ambassador
3175	18	PX029. 1972	PX 029, a 1972
3176	9	inadmisslbe	inadmissible
3176	17	quicker	quickly
3176	20	THECOURT	THE COURT

**OFFICE COPY ENTERED**

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----  
COLUMBIA BROADCASTING  
SYSTEM

: Before:  
: HON. MORRIS E. LASKER,  
: District Judge.

VS.

AMERICAN SOCIETY OF  
COMPOSERS, AUTHORS and  
PUBLISHERS

69 Civil 5740

-----  
X

New York, November 28, 1973

STENOGRAPHER'S MINUTES

SOUTHERN DISTRICT COURT REPORTERS  
UNITED STATES COURT HOUSE  
FOLEY SQUARE, N.Y. N.Y. 10007 TELEPHONE: CORTLANDT 7-4586

gab-

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Columbia Broadcasting System

vs.

69 Civil 5740

American Society of Composers.  
Authors and Publishers, et al.

New York, New York.  
November 28, 1973  
9:30 A.M.

(Trial resumed.)

THE COURT: Good morning.

MR. COLLINS: Your Honor, last night I did check through ASCAP and BMI's objections and I do have another group of documents as to which ASCAP does not object and BMI's only objection is that they are not admissible against BMI.

I do assume that is on the stipulation, that will be covered by the stipulation. I would be prepared now simply to read a list.

THE COURT: That would be fine, just a question of having Miss Kearse agree as to the numbers.

They will be admitted subject to the fact that they are not admissible against BMI except to the extent covered by the stipulation.

MR. COLLINS: PX19, PX029, PX102, PX106,  
PX402, PX405, PX406 --

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MR. TOPKIS: Just a second. I am going to  
stay with you. 405?

MR. COLLINS: 405. PX406, PX407, PX411,  
PX416, PX423, PX426, PX437, PX428, PX450, PX451, PX452 --

MR. TOPKIS: Excuse me. Is BMI objecting to these?

THE COURT: BMI objected to them only to preserve the inadmissibility of the documents --

MR. TOPKIS: We are now in an area of BMI license  
forms?

MISS KEARSE: Which ones are we talking about now?

MR. TOPKIS: 450 OF 451?

MISS KEARSE: We stated no objection to 450 and

THE COURT: What is that?

MISS KEARSE: We stated we had no objection to  
450 and 451.

MR. COLLINS: PX522. --

MISS KEARSE: Excuse me. Yes, as to PX426, we objected also on the grounds of relevance.

MR. COLLINS: I am sorry.

THE COURT: What is the document, 426? I'll let you make a note of it. When you finish reading the document, we will go to it.

MISS KEARSE: The same is true as 428 and 437.

MR. COLLINS: PX522, PX524 --

MISS KEARSE: May I interrupt and inquire  
where in your letter these last two are set out?

MR. COLLINS: These should be set out in the  
front on Page 3. PX522, PX524, PX525, PX526, PX528,  
PX578.

THE COURT: All right. Does that leave us to  
judge the special objections as to relevance made by BMI as to  
several of these exhibits?

MR. COLLINS: Yes.

MISS KEARSE: Yes.

MR. COLLINS: I don't know how they got on my  
list.

THE COURT: As long as they are on your list  
the objections have been stated, will you tell me what each  
one of the documents is and in --

MR. COLLINS: Perhaps I could cover them as  
I go through the rest of the documents now.

THE COURT: You mean they all require rulings  
from here on in?

MR. COLLINS: Yes, from here on in.

THE COURT: All right.

MR. COLLINS: I would offer them in evidence

and ask that they be received in evidence.

THE COURT: The documents enumerated will be received under conditions specified except for those to which Miss Kearse indicated specific objection.

MISS KEARSE: Yes. Would you like me to state for the record at this point what they are?

THE COURT: Yes.

MISS KEARSE: PX426, 328 and 437.

MR. HRUSKA: Do you happen to have a handy reference to the page of your letter? If you don't, forget it.

MISS KEARSE: I think since those documents were not numbered in your letter, they appear in the sequence in which they appeared in your letter.

MR. HRUSKA: Okay.

MR. COLLINS: The next document I wish to offer is PX429, which is the printouts supplied to us by ASCAP of the names and addresses of individuals who have compositions in the ASCAP performed works index and the titles of the compositions in the performed works index owned by the individuals.

It is subject to a protective order and AF asks for confidential treatment for the document.

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2 THE COURT: Is ASCAP objecting to its introduction  
3 or just asking for the protective order? I take it there  
4 is no objection to a protective order being granted.

5 MR. COLLINS: No.

6 MISS KEARSE: We have objected partly on the  
7 ground that it is not admissible against BMI, partly  
8 on the ground we haven't seen it since it is subject to a  
9 protective order. I don't even see how it can apply  
10 to us through application of the stipulation.

11 THE COURT: I am not sure it will. I am not  
12 ruling that it does. I don't suppose every piece of evi-  
13 dence that comes in against two defendants must always  
14 apply to both defendants. To the extent it doesn't, you  
15 are just not affected.

16 MR. HRUSKA: I think it is important, your Honor,  
17 that this particular list which does bear on the bypass  
18 issue vis-a-vis ASCAP and CBS, and I think also on Section  
19 2 issue, but in terms of the connection with BMI, we are  
20 interested in the bypass issue in connection through the  
21 stipulation. So this would be a document for which it  
22 would be important to have applied to BMI through the stipu-  
23 lation.

24 THE COURT: You will have to do either one  
25 of two things. You will either have to explain to me now

2 how a list of ASCAP members can even by stipulation  
3 affect BMI's position or as to all these matters we will  
4 have to admit them subject to the stipulation that exists  
5 and let me judge as to when the time comes whether the  
6 stipulation applies or not. I must say in this particular  
7 case I would like to know what your theory is. I am a  
8 little confused by it.

9 MR. COLLINS: This is the one thing we want to  
10 use this for, to be able to compare the number of songs held  
11 by a member with perhaps his membership in AGAC.

12 THE COURT: I mean, you are talking about his  
13 application to BMI?

14 MR. BAKER: Your Honor, at the time we were  
15 taking Mr. Arrow's deposition, I put in some contracts of  
16 the people who didn't deal with 3M -- of people who did  
17 deal and identified some people who didn't deal. Mr. Topkin  
18 put in the contracts of a number of publishers who did  
19 deal and I guess the position which we will take is simple  
20 numbers of publishers do not accurately reflect the story,  
21 and one of the ways to judge the relevance of a publisher  
22 who dealt and didn't deal is the number of songs that  
23 has in the performed works index.

24 Therefore, it would be relevant to the bypass  
25 issue.

THE COURT: I can understand it may be relevant to the bypass issue. I forget the terms of the stipulation between BMI and ASCAP.

I don't know whether it says that anything that comes in on the bypass issue automatically affects BMI. If that is what you have stipulated, that is what you have stipulated. I don't know whether Miss Kearse is objecting on the grounds it doesn't relate to bypass issue because I can see it might. I assume she is objecting it doesn't fall within the terms of the stipulation.

MISS KEARSE: I am objecting also to having anything used against BMI that we are not allowed to see.

THE COURT: We will come to that. Is that your only objection?

MISS KEARSE: I don't think it relates to the by-pass issue.

THE COURT: You don't concede it does?

MISS KEARSE: Certainly not.

THE COURT: I'm prepared to believe it is relevant to the by-pass issue. So I put that aside.

What problems does it create for you if BMI sees this?

MR. TOPKIS: Miss Kearse, I trust her with my life. Anything that she wants is fine with me. If she wants to be burdened with looking at the things, she can be on assumption, of course, that it won't be transmitted to her client. I'm not confining my remarks to Miss Kearse, of course, any of her colleagues.

THE COURT: Mr. Topkis' life is in your hands, Miss Kearse.

MISS KEARSE: I'll share it with my colleagues.

THE COURT: I guess we are over that now.

MR. COLLINS: The next two exhibits I offer are PX 426, PX 427, PX 426 is a list supplied to us by ASCAP, computer listing, in alphabetical order of the compositions first surveyed during the years 1969 to '72 by quarter.

PX 427 is a chart showing the number of compositions first

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surveyed during each quarter. For those documents that is relevant to the issue of by-pass, no objection from ASCAP. BMI has objected on the grounds that they are irrelevant.

THE COURT: Irrelevant to by-pass, is that it?

MISS KEARSE: Irrelevant to anything that is involved in this case.

MR. COLLINS: Your Honor--

THE COURT: Under what theory is it claimed they are relevant?

MR. COLLINS: One of the problems that a producer of a television program would face in an attempted by-pass is getting access to new music. These documents reveal the nature and extent of that problem in terms of the numbers of that problem in -erms of the numbers of compositions ordered by quarter, by year.

THE COURT: I'm going to allow such documents for what they are worth. I must admit it is very difficult at this particular stage of the proceeding to determine whether I ultimately will agree with your thesis or not. I'm not going to foreclose you to use the term to persuade me that it is relevant.

It is received subject to objection.

MISS KEARSE: We have not seen that document either, your Honor.

THE COURT: I take it the same ruling will apply to these documents.

MR. TOPKIS: Sure.

MR. MRUSKA: May I say very briefly on this, your Honor, I think it is similarly difficult at this stage of the case before all the evidence has gone in, before the findings have been written, to know exactly how each one of these pieces of paper will fit into the hole, which will later constitute our proposed findings of fact. I'm sure the other parties are in the same position, too.

THE COURT: I understand.

MR. COLLINS: I offer PX 428, documents supplied by ASCAP listing the number of compositions in the ASCAP performed works index. ASCAP has no objection. BMI--will have to ask you what your objection is. This is on my list where I seem to have some difficulty.

MR. KEARSE: We object on the grounds it was not binding against BMI and not relevant.

MR. COLLINS: I think it is relevant in this case to have some determination of the size of the ASCAP performed works intention.

THE COURT: I have already expressed myself on that. I agree with you. How important it is is another question. It has relevance, I agree, and subject to, if it is

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2 confidential, to Miss Kearse's access to it, it is admitted.

3 MR. COLLINS: Your Honor, I am not sure whether we  
4 had a formal ruling that 426 and 427 were received in evi-  
5 dence.

6 THE COURT: The ones we discussed just a moment  
7 ago?

8 MR. COLLINS: Yes.

9 THE COURT: They are.

10 MISS KEARSE: You did not offer 427, 437.

11 MR. COLLINS: 426 and 427, those are the documents  
12 we just discussed.

13 THE COURT: They are received subject to the  
14 comments which I made.

15 MISS KEARSE: Did you offer 437?

16 MR. KRUSKA: No.

17 MISS KEARSE: That was the one you said earlier was  
18 out of sequence.

19 MR. KRUSKA: Off the record.

20 (Discussion off the record.)

21 MR. COLLINS: The next two documents I would offer  
22 are PX 400 and 401, documents supplied by ASCAP listing the  
23 present officers and directors of ASCAP in PX 401 and the  
24 officers and directors of ASCAP from 1945 to 1969 in document  
25 PX 401.

BMI objects on the grounds that they are irrelevant, ASCAP has no objection. I offer them in evidence.

THE COURT: I assume they are irrelevant vis-a-vis BMI, but they are received subject to the rulings I have made before.

MR. COLLINS: I offer PX 001, which is a portion of the trial transcript in the Cascade litigation, statement by--

THE COURT: How large a portion?

MR. COLLINS: I think it is two pages, your Honor. One page, your Honor, with a cover page on top.

THE COURT: That's one page. Is this what were talking about yesterday?

MR. COLLINS: I offer to his knowledge and expertise in the area of broadcasting, Mr. Finkelstein.

THE COURT: That offer is denied subject to your right to put it into evidence if Mr. Finkelstein testifies inconsistently with it, and your right to examine him as to whether he made such a statement on the stand.

(Plaintiff's Exhibits 019, 029, 102, 106, 402, 405, 406, 407, 411, 416, 423, 450, 451, 452, 522, 524, 525, 526, 528, 578, 426, 427, were received in evidence.)

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THE COURT: Never mind that. What does he allegedly admit.

MR. COLLINS: He admits that he's been dealing with radio and television broadcasters for the last 30 years on an almost daily basis.

THE COURT: I think that is really ridiculous. Can't you ask him how long he has been doing it? That's an admission?

MR. TOPKIS: That's why I said you won't believe it.

MR. HRUSKA: That's easy to say.

THE COURT: Look, presumably I am objective on the situation except to the extent that my time is involved on this thing and that's really a gut reaction of mine.

I just think it is ridiculous for me to have to be fed or even take time to rule on this question.

I'll take judicial notice of the fact that Mr. Finkelstein has been dealing with these people but aside from that, one simple question would elicit that on the stand and we have spent 10 minutes talking about it. My ruling stands.

You said yesterday, Mr. Hruska, and I don't know whether it is applicable or not, what I am about to say you said in effect after everybody got the feel of my attitude

towards these exhibits perhaps it would have an influence on those to be offered. And if there are a whole bunch more like this you might want to review them to consider it.

I am not suggesting that they are all what I consider to be as obvious as the last document.

MR. HRUSKA: I don't think there are. I think they're irrelevant now.

Now, Mr. Collins is referring to an answer to an interrogatory.

THE COURT: An answer to an interrogatory may be slightly different, yes.

MR. COLLINS: This is ASCAP's answer to our interrogatory 34B. ASCAP has no objection to its introduction.

BMI objects.

MISS KEARSE: On the grounds that it is not binding against us.

MR. COLLINS: That was one that we cut out your suggestion before.

MISS KEARSE: Does it have a number?

MR. COLLINS: 423.

MISS KEARSE: Yes, we object on the grounds that it is not binding on us.

THE COURT: Subject to the regular ruling that particular issue, it is admitted.

xx

(PX 423 received in evidence.)

MR. COLLINS: The next document I offer is PX  
485.

These are forms of agreement between ASCAP and  
Musak, 1959-'66 and 1966-1970.

MISS KEARSE: Does this appear in your letter?

MR. COLLINS: PX 485.

MISS KEARSE: Where is it in the letter?

MR. TOPKIS: I'll say quickly, your Honor, if  
they want to offer agreements that we have had with Musak,  
I have no objection.

MR. COLLINS: You had no objection, Mr. Topkis.  
It is only because BMI has an objection.

Page 13 of my letter, in the middle of the page.

MISS KEARSE: We objected on the grounds that  
it was not binding on us and not relevant.

MR. COLLINS: Maybe it would be helpful to me--  
I did give you yesterday a copy of my document marked up  
with all the numbers on it and I sort of gathered that you  
would be operating with that document.

MISS KEARSE: That's right. I am working with  
my objections because your document didn't have any objec-  
tions on it.

THE COURT: Let's move along. That is admissible

subject to the limitations on applicability to BMI.

(PX 485 received in evidence.)

MR. COLLINS: I offer PX 533, a letter from Paul Fagan to Merrill Flood.

I offer this letter to show the cost of the ASCAP survey of TV networks.

MISS KEARSE: We have objected to this, I believe, on the grounds that it is not binding on BMI and it has not been disclosed to BMI. We haven't seen it.

MR. COLLINS: It's subject to a protective order. ASCAP did not object to it.

MR. TOPKIS: It is subject to a protective order, your Honor, and--

THE COURT: Can we agree that with regard to such items as Miss Kearse objects to because the protective order has prevented her from seeing them, that she personally be allowed to see them?

MR. TOPKIS: Yes.

MISS KEARSE: I don't see what possible effect it could have, being binding on BMI.

THE COURT: I don't know that it would.

BMI need no longer make any objections that documents are not binding on BMI if, as a matter of law, I find that they are not binding on BMI and you are free to express

such objections in whatever later arguments or briefs are filed.

MISS KEARSE: Thank you.

THE COURT: And the same is true for ASCAP or any party.

In other words, objections as to relevance and binding are saved.

MISS KEARSE: I would like to be able to argue relevance at this point.

(PX 533 received in evidence.)

MR. COLLINS: Next I would offer 3M PX 106 and at the same time PX 409. These are comparisons of ASCAP and BMI payment formulas, PX 409, prepared by ASCAP, dated 1969 and 3M PX 106 is dated 1971.

BMI objects on the grounds that it is irrelevant and ASCAP has no objection.

THE COURT: Do you recall the grounds?

MISS KEARSE: It doesn't have to do with the lawsuit.

MR. COLLINS: I think that is basic background material, some indication as to the pay out or the per use basis, the distribution system, of the two societies.

Certainly it contains information as to ASCAP?

THE COURT: I'll accept it subject to argument.

that it is not relevant. I can't determine these things at this particular stage. You may very well be right, Miss Kearse. I don't know how much background we are going to need.

(3-M PX 106 and PX 409 received in evidence.)

MR. COLLINS: I offer PX 417 and PX 418. These are documents supplied by us by ASCAP in answer to interrogatories setting forth the average value of an ASCAP writer and ASCAP publisher credit. I think that is again relevant to computations.

THE COURT: As far as I can tell, it is not binding on BMI and it is admitted.

MISS KEARSE: Our objection is also to the relevance of the document.

THE COURT: Well, if it is not binding on you, then I don't know that you have any standing to object to the relevance of it. But I'll admit it.

(PX 417 and 418 received in evidence.)

MR. COLLINS: PX 416, PX 421, and PX 422. I offer these exhibits into evidence. They are documents supplied to us by ASCAP setting forth the performance credits earned by CTN, NBC and ABC during the years 1960-69.

THE COURT: The ASCAP credits?

MR. COLLINS: Yes.

THE COURT: Is BMI's position the same as it was on the last exhibit?

MISS KEARSE: Yes.

THE COURT: Same ruling.

(PX 416, 421 and 422 received in evidence.)

MR. COLLINS: PX 432, which I offer in evidence is a document supplied to us by ASCAP listing the catalogues owned by each of the top 14 ASCAP publisher groups. This is subject to a protective order and BMI's objection is on that ground.

ASCAP has no objection.

THE COURT: Subject to Miss Kearse's right to inspect the exhibit, it is admitted.

(PX 432 received in evidence.)

MR. COLLINS: Could I ask that if Mr. Topkis has any objections to that, that he let me know.

MR. TOPKIS: You may be assured I will.

MR. COLLINS: I mean at this time.

MR. TOPKIS: Yes.

MR. COLLINS: PX 432, the documents supplied to us by ASCAP, showing the total distribution, total credits and total CTN credits for the top 50 ASCAP writer members on the Four Fund Plan.

I offer the document in evidence and BMI's

objection is that it has not been disclosed. It is subject to a protective order.

THE COURT: I don't see how that item can be applicable to BMI under any circumstances and therefore, why it would be necessary, although I have no feeling and apparently Mr. Topkis doesn't either, for BMI even to inspect that document. I assume that that will be brought to my attention in relation to your argument, the argument of Dr. Fisher, that the effect of the Four Fund setup is to keep people in ASCAP and so on and that doesn't apply to BMI at all, does it?

MISS KEARSE: I don't believe so.

MR. HRUSKA: That is part of it. We will think it is relevant to by-pass.

THE COURT: Well, I think whatever you stated I am going to have to distinguish between those items which are relevant to by-pass and obviously do apply to BMI and are applicable to BMI and those which obviously don't because they simply don't exist in BMI's case and this would be one of them, I should think.

It is admitted but do you want to argue that you should have access to that?

MISS KEARSE: I don't need to see it if it is not admitted against BMI.

2  
3 MR. COLLINS: With the exception that it is  
4 admitted against them to the extent covered by the stipula-  
5 tion. As to by-pass.

6 THE COURT: To the extent that you are able to  
7 argue at it. At this stage, my inclination is to say that  
8 it is not relevant, even by virtue of the stipulation.

9 MR. COLLINS: That the document is not applicable.

10 THE COURT: It is not applicable to BMI. I think  
11 it is relative to the subject of by-pass, but by-pass as to  
12 ASCAP.

13 It is received in evidence.

14 (PX 432 received in evidence.)

15 MR. TOPKIS: A further problem, your Honor, and  
16 I am just putting my friends over there on notice that every  
17 time in my experience that you get into confidential docu-  
18 ments in a case, you create a mare's nest for yourself.

19 THE COURT: Let's leave tomorrow's mare's nest  
20 until tomorrow.

21 I agree with you.

22 MR. HRUSKA: I agree with that, too. Perhaps  
23 at the end of the case when we start briefing and if it  
24 presents a problem, we can come to your Honor and resolve it  
25 at that time.

26 MR. COLLINS: PX 459. This document consists of

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2 the ASCAP publisher performance record. It sets forth  
3 total performance credits for the group of publishers--  
4 for publisher groups. Maybe I'll just list them. Chappell,  
5 Essex, Famous, Feist, Miller and Robbins, which is one  
6 group.

7                   Leeds, Shapiro Bernstein, Morris and Warner  
8 Brothers.

9                   And the summary pages for each of those I have  
10 given a sub-number A through H as indicated in the marked up  
11 letters I have given you.

12                  I offer them in evidence. ASCAP has no objection  
13 provided they are treated as confidential.

14                  THE COURT: BMI's position is the usual?

15                  MISS KEARSE: Yes.

16                  THE COURT: Do you assert that--is this by-pass  
17 material?

18                  MR. COLLINS: Yes.

19                  THE COURT: Then subject to--I mean I can't judge  
20 that at this moment it is and I am not determining that it  
21 is but subject to Miss Kearse's right to examine the material  
22 if necessary, it is admitted.

23                  (PX 459 received in evidence.)

24                  MR. COLLINS: I'll offer as a group PX 419, 420,  
25 463 and 464. These are ASCAP answers to interrogatories and

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an affidavit by Herman Finkelstein and a court document in  
US v. ASCAP with a letter of Stanley ~~Adler~~ attached. The  
only purpose of introducing these documents is to be  
able to calculate the payments by ABC, NBC, to ASCAP in  
the years as to which those documents give information.  
Basically 1960 to 1969, basic background material.

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